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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 197.

JOHN EATON, EDWARD H. COLE, WILLIAM H. COLE, AND EDWARD G. BURNHAM, APPELLANTS,

vs.

EDWARD G. THOMPSON, TRUSTEE FOR CLARA E. CARR, EXECUTRIX, AND GEORGE D. SCOTT, EXECUTOR OF WILLIAM S. CARR, DECEASED, AND SARAH BARTHOLOMEW.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 18, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 [SEAL.] The President of the United States of America to John Eaton, Edward H. Cole, William H. Cole, and Edward G. Burnham Greeting:

You are hereby commanded that you, and each of you, personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit court, in equity, on the first Monday of August, A. D. 1879, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Charles F. Blake, trustee, &c., William S. Carr, & Sarah M. Bartholomew, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, on the seventh day of July, in the year one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the hundred and fourth.

JOHN I. DAVENPORT, *Clerk.*

CHARLES F. BLAKE,
Compl'ts' Sol'r.

The defendants are required to enter appearance in the above cause in the clerk's office of this court on or before the first Monday of August, 1879, or the bill will be taken *pro confesso* against them.

J. I. D., *Clerk.*

2 I hereby certify that on the 9th day of July, 1879, at the city of New York, in my district, I personally served the within subpœnas upon the within-named John Eaton, Edward H. Cole, & Edward G. Burnham, by exhibiting to each of them the within original, and at the same time leaving with each of them a copy thereof. William H. Cole not found.

Dated July 10, 1879.

LOUIS F. PAYN,
U. S. Marshal, S. D. N. Y.

[Endorsed:] U. S. circuit court. Filed July 10, 1879. John I. Davenport, clerk.

3 United States Circuit Court, Southern District of New York.

CHARLES F. BLAKE, Trustee, &c., WILLIAM S. CARR, and SARAH M. BARTHOLOMEW,
vs.
JOHN EATON, EDWARD H. COLE, WILLIAM H. COLE, and EDWARD G. BURNHAM.
} In Equity.

To the honorable the judges of said court:

Charles F. Blake, a resident of the city, county, and State of New York, and a citizen of said State, and William S. Carr and Sarah M. Bartholomew, both residents of said city of New York, and both

citizens of said State of New York, bring this their bill of complaint against John Eaton, a resident of the State of Pennsylvania and a citizen of said State, Edward H. Cole and William H. Cole, both residents of the city of Brooklyn, State of New York, and both citizens of the said State of New York, and Edward G. Burnham, a resident of the State of Connecticut, and a citizen of said State of Connecticut.

4 And thereupon complain and say that heretofore, and before the 5th day of August, A. D. 1856, one William S. Carr became and was the original, true, and first inventor of a new and useful improvement in water closets, not known or used by others prior to his said invention; that thereupon he made application to the Commissioner of Patents of the United States for letters patent therefor; that thereafter letters patent of the United States were issued to him in due form of law for the said invention, which letters patent are dated the 5th day of August, 1856, and secure to him, his heirs, administrators, or assigns, for the term of fourteen years from the date thereof, the full and exclusive right to make, use, and vend to others to be used, the said invention.

And your orators further show unto your honors that thereafter, and before the 12th day of June, 1860, the said Carr, for good and lawful reasons, surrendered said letters patent to the Commissioner of Patents, and prayed that the same might be reissued on an amended specification for the same invention. That thereupon the Commissioner of Patents caused new and amended letters patent to be issued to the said Carr, which are for an invention described in said original letters patent, and which bear date the 12th day of June, 1860, and are numbered reissue 978, as by reference to a duly

5 certified copy thereof, in court to be produced, will fully and at large appear.

And your orators further show unto your honors that thereafter, and before the expiration of said letters patent, the said Carr, being desirous of extending the same for a further term, made application by petition in due form of law to the Commissioner of Patents for an extension of said letters patent reissued as aforesaid, for the further term of seven years, from the expiration of the original term thereof; that thereupon the said Commissioner extended the said letters patent so granted and reissued as aforesaid for the further term of seven years from and after the 5th day of August, 1870, as by reference to the certificate of extension attached to said reissued letters patent, or a certified copy thereof, in court to be produced, will more fully and at large appear.

And your orators further show unto your honors that heretofore, and before the 7th day of April, A. D. 1868, the said William S. Carr became and was the original, true, and first inventor of a certain other new and useful improvement in water closets, not known or used by others before his invention thereof; that thereafter he made application in due form of law for letters patent of the United States for said invention; that thereafter the said Commissioner of Patents caused letters patent of the United States to be issued to him, the said Carr, for his last-named invention, which bear date the 7th

day of April, 1868, and are numbered 76398, and grant and secure unto the said Carr and his legal representatives the full and exclusive right and liberty of making, using, and vending the
6 said invention for the term of seventeen years, from the said 7th day of April, 1868, as by reference to a duly certified copy thereof, in court to be produced, will fully and at large appear.

And your orators further show unto your honors that by an instrument in writing duly executed, bearing date the 27th day of March, 1872, the said William S. Carr assigned, sold, and set over unto your orator Charles F. Blake, and unto Charles M. Keller, since deceased, and the survivor of them, in trust, the said several letters patent and the inventions thereby secured, as by reference to said deed of assignment, or a duly certified copy thereof, in court to be produced, will more fully and at large appear.

7 And your orators aver and charge the fact to be, that the said William P. Carr original, true, and first inventor and discoverer of the various improvements in water closets, described and claimed in and by said several letters patent, and that the same had not been known or used by others before the invention thereof by him.

8 And your orators further show unto your honors that, before the 12th day of October, 1858, Frederick H. Bartholomew became and was the original, true, and first inventor of a certain new and useful improvement in water closets, not known or used by others before the invention thereof by him; that thereupon he made application to the Commissioner of Patents for letters patent therefor; that thereafter letters patent were issued to him for the said invention, in due form of law, which bear date the 12th day of October, 1858, and are numbered 21734, and grant and secure unto the said Bartholomew, his heirs, executors, administrators, and assigns, for the term of fourteen years from the date hereof, the full and exclusive right and liberty of making, using, and vending to others to be used, the said invention, as by said letters patent, or a duly certified copy thereof, in court to be produced, will more fully and at large appear.

And your orators further show unto your honors that the said Bartholomew departed this life at the city, county, and State of New York, on or about the 15th day of October, 1869, and that by
9 his last will and testament he bequeathed unto his wife, Sarah Bartholomew, the said several letters patent above recited, and the inventions thereby secured, which said will was admitted to probate on or about the 3d day of November, 1869, as by said will, or a duly certified copy thereof, in court to be produced, will more fully and at large appear. And that said Sarah Bartholomew, having been appointed executrix of the last will and testament of the said Frederick H. Bartholomew, thereafter duly qualified as such executrix, and acted as such.

And your orators further show unto your honors that thereafter and before the expiration of said letters patent, the said Sarah Bartholomew, executrix as aforesaid, being desirous of extending the said last-named letters patent for a further term, made application

by petition in due form of law to the Commissioner of Patents, for an extension of the same; that thereafter the said Commissioner extended the said letters patent for the further term of seven years, from and after the date of expiration thereof, to wit, the 12th day of October, 1872, as by reference to the certificate of extension attached to said last-named letters patent, or a certified copy thereof, in court to be produced, will fully appear.

And your honors further show unto your honors that by an instrument in writing, under her hand and seal, duly executed, and bearing date the 27th day of March, 1872, the said Sarah Bartholomew, as such owner and holder of said several letters patent, assigned, transferred, and set over unto your orator, Charles F. Blake, and unto Charles M. Keller, since deceased, and the survivor of them, in trust, the said several letters patent above recited, as by reference to said deed of assignment, or a duly certified copy thereof, in court to be produced, will more fully and at large appear.

10 And your orators further show unto your honors, that he verily believes, and therefore charges the fact to be, that the said Frederick H. Barthlomew was the original and first inventor of the improvements described and claimed in the several before recited letters patent granted to him, and that the same had not been known or used by others before the invention thereof by him.

And your orators further show unto your honors that on or about the 1st day of August, 1874, your orator, Charles F. Blake, and his then co-trustee, Charles M. Keller, since deceased, filed their certain bill of complaint in the United States circuit court in and for the eastern district of Pennsylvania against George R. Kirk, and in their said bill alleged that the said defendant had infringed their exclusive rights secured to them in and by the said several letters patent, and all of them upon which this bill is brought, by his manufacture and sale of water closets or parts thereof, and prayed for an accounting and injunction. That the said defendant appeared and answered, that complainants filed their replication to said answer, that thereafter both sides took testimony for final hearing at great length, that thereafter the said cause came on to be heard before his honor William McKennan, judge, and was duly argued by counsel, that thereafter, and on or about the 8th day of October, 1878, the said judge filed his opinion in said cause in favor of the complainants, and thereafter, and on or about the 18th day of October, 1878, a decree was entered and filed in said cause, in which it was ordered, adjudged, and decreed among other things that the title to the said several letters patent, upon which said bill

11 was brought, was vested in your orator, Charles F. Blake, as sole surviving complainant trustee, that the said several letters patent and each of them were good and valid in law, that the said Carr and the said Bartholomew, respectively, were the original and first inventors of the inventions described and claimed in their said several original and reissued letters patent, respectively, and that the defendant Kirk had infringed the fourth claim of the said patents, Number 76398, and had infringed the first claim of said patent No. 21734, and had infringed the third claim of said re-

issued and extended letters patent, No. 978. And that your orator, Charles F. Blake, sole surviving complainant in said suit, should recover the profits, gains, damages, and advantages, which the said George R. Kirk had received or made, or which had accrued to him him by reason of his said infringement, and his costs. And referred the matter to a master for accounting in the usual form. And ordered a perpetual injunction against the said defendant according to the prayer of the bill, enjoining and restraining him from infringing said several claims of the said letters patent which were then in force.

And your orators further show unto your honors, that on or about the 15th day of August, 1872, your orator, Charles F. Blake, and his then co-trustee, Charles M. Keller, filed their bill of complaint in the U. S. circuit court in and for the northern district of Illinois against Ludwig Wolff, alleging that the said Wolff had infringed by his manufacture, use, and sale of water closets, the said letters patent upon which this suit is brought.

12 That after the decree had been entered in the said Kirk case, your orator, Charles F. Blake, moved thereon against said Ludwig Wolff, that thereafter and on or about the 30th day of October, 1878, a decree was entered in said Wolff case sustaining your orator's rights in all respects as in said Kirk case set forth.

And your orators aver, and charge the fact to be, that the water closets made and sold by the defendant herein are substantially the same in construction and mode of operation, both as to the completed closet and as to the particular devices set forth and claimed in the patents upon which this suit is brought, as the water closets and devices thereof made and sold by the defendants Kirk and Wolff, respectively, in said suits aforesaid held to be infringements of the patents upon which this suit is brought.

And your orators further show unto your honors that on or about the 14th day of October, 1874, the said Charles M. Keller, co-trustee with your orator, Charles F. Blake, departed this life at Milburn, in the State of New Jersey, and that by the terms of the said deeds of trust the said trust devolved unto your orator, Charles F. Blake, as sole surviving trustee.

And your orators further show unto your honors that the said several inventions, described in the said several letters patent, the right to which is now vested in your orator, Charles F. Blake, as sole surviving assignee in trust, are of great value and that he and the said Charles M. Keller, his co-trustee, during his lifetime, have made them of great benefit and advantage to the trust held by him and to the public, and will continue so to do if the infringement by the defendants herein and others be prevented.

13 Yet the said defendants well knowing the premises, but contriving and wrongfully intending to injure your orators and to deprive them of the gains and profits which might, and otherwise would accrue to them from the use and sale of the said several inventions, have confederated together jointly to injure your orators and have sold and are still selling great numbers of water closets, each containing and embodying in their construction the said

several inventions described and claimed in the several letters patent before recited, the sole and exclusive right to the use, manufacture, and sale of which is vested in your orator, Charles F. Blake, and he fears a continuance of such infringement and violation of your orators' rights, and that they have heretofore sold large numbers of water closets, embodying the several inventions described and claimed in said letters patent No. 978, which have now expired.

And your orators aver, and charge the fact to be, that the said defendants have been notified of their said infringement, and warned to desist therefrom, but that they have not desisted but continue the same to the great damage of your orators in the sum of fifty thousand dollars.

And your orator Charles F. Blake further shows unto you honors that he is able, willing, and anxious to supply all the demand of the public for water closets, embodying the inventions described and claimed in said several letters patent respectively, and any and all of them.

Which said actions and doings of the said defendants are contrary to equity and good conscience, and tend to the manifest injury of your orators in the premises.

14 Wherefore your orators pray—

1. That the defendant may answer, under oath, the premises.

2. That they may be enjoined, during the pendency of this suit, from such infringement of said several letters patent now in force.

3. That they may be perpetually enjoined from such infringement.

4. That they may account to the complainants for the water closets and parts thereof sold, or used by them, in infringement of said several letters patent, and any and all of them, in violation of your orator's said exclusive rights, and for all monies received from the use and sale thereof, and may be decreed to pay over unto your orators any and all profits made or derived from said sales, in violation of your orators' said rights.

5. That they may be decreed to pay the costs of this suit.

6. And that damages to the amount of fifty thousand dollars may be adjudged to your orators against the defendants for such violation of their said exclusive rights and for their infringement.

And for other and further relief, may it please your honors to grant unto your orators—

1. A writ of subpœna, in due and usual form and under the usual penalties, directed to the respondents, John Eaton, Edward H. Cole, William H. Cole, and Edward G. Burnham.

15 2. A writ of injunction restraining them from such infringement during the pendency of this suit, and also their agents, attorneys, servants, confederates, and workmen.

3. A writ of injunction restraining them and their servants, agents, attorneys, confederates, and workmen from such infringement perpetually.

All duly sealed and tested in due and usual form and under usual penalties, and directed to said respondents, John Eaton, Edward H. Cole, William H. Cole, and Edward G. Burnham.

4. And such other and further relief as equity may require and to your honors shall seem meet.

CHARLES F. BLAKE.

CHARLES F. BLAKE,
Solicitor and Counsel for Complainants,
16 Murray Street, New York City.

16 UNITED STATES OF AMERICA, }
County of ———, *State of* ———, } *ss:*

Charles F. Blake, being duly sworn, says that he is one of the complainants named in the foregoing bill subscribed by him; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge, except such matters and things as are therein mentioned on information and belief, and as to such matters he verily believes it to be true.

CHARLES F. BLAKE.

Subscribed and sworn to before me, this — day of ——, ——.

17 (Endorsed:) United States circuit court, southern district of New York. Charles F. Blake, trustee, *et als.*, *vs.* John Eaton *et als.* Bill. U. S. circuit court. Filed Jul. 7, 1879. John J. Davenport, clerk.

18 Circuit Court of the United States, Southern District of New York. In Equity.

CHAS. F. BLAKE
vs.
JNO. EATON, E. H. COLE, & E. G. BURNHAM.

SIR: Please take notice that I have been retained by and appear for the defendants in the above-entitled action.

Dated New York, the 4 day of August, 1879.

SAM'L S. BOYD,
No. 421 Olive St., Saint Louis, Mo.

To CHAS. F. BLAKE,
Sol'r for Compl't.

19 (Endorsed:) United States circuit court, southern district of New York. In equity. Chas. F. Blake *et al. vs.* John Eaton & *al.* Appearance for defendant by Sam'l S. Boyd, No. 421 Olive street, Saint Louis, Mo. U. S. circuit court. Filed Aug. 5, 1879. John I. Davenport, clerk.

20 United States Circuit Court in and for the Southern District of New York. In Equity.

CHARLES F. BLAKE, Trustee, *et al.*, Compl't-,
vs.
JOHN EATON, EDWARD H. COLE, WILLIAM H. COLE, and EDWARD G. BURNHAM, D'f'ts.

To the honorable the judges of the circuit court of the United States in and for the southern district of New York:

The joint and several answer of John Eaton, Edward H. Cole, and Edward G. Burnham, defendant- to the bill of complaint of Charles F. Blake, trustee, &c., William S. Carr, and Sarah M. Bartholomew, complainants.

These defendants now and at all times hereafter saving and
21 reserving to themselves, and each of them, all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainants' said bill of complaint contained, for answer thereunto or unto so much and such parts thereof as these defendants are advised, is or are material or necessary for them, or either of them, to make answer unto, they, these defendants, severally answering, say: That they admit, on information and belief, that the several patents and the extension and reissue, as in said bill alleged, were granted in the manner, for the purpose, and at the several dates as in said bill set forth, but these defendants deny any knowledge, information, or belief in respect to the assignments in said bill alleged, or whether the said Charles F. Drake is
22 vested with the said trust, or any trust, in relation to said patents, or either of them, and therefore they deny the same, and leave the complaint to make such proof thereof as they may be advised.

Further answering, these defendants aver that they have no knowledge, information, or belief as to whether the exclusive rights claimed to be vested in complainants under and by virtue of said letters patent, are of great or any value, or whether the said complainants have been to great or any trouble or expense in attempting to make the said invention of benefit or advantage to themselves, and consequently they deny each and every allegation in said bill in relation thereto.

Further answering, these defendants deny that they or either of them have at any time hitherto or are now selling the said
23 pretended inventions, or any water closets or parts of water closets, in any part thereof substantially the same in construction and operation as the invention mentioned in said letters patent, or either of them, or constructed in whole or in part upon the principle and in the manner of the invention described and covered by and in said letters patent, or either of them, but these defendants admit that as members of "The Eaton, Cole & Burnham Co.," a corporation duly organized under and in accordance with the laws of the State of Connecticut, and not otherwise, they have

sold and are still selling, water closets constructed in accordance with certain letters patent of the United States granted one John C. Kupferle and one P. White, bearing date April 17, 1877, and numbered 189,562, as they have good and perfect right to do, as thereby they infringe upon no exclusive right that can be claimed
24 by said complainants under and by virtue of said letters patent, or either of them.

And for a further answer and defence against the claims of the above named complainants, these defendants aver on information and belief that neither the said Carr nor the said Bartholomew was the first and original inventor of the improvement set forth and claimed in said letters patent, or either of them, but that, as these defendants are informed and believe, long anterior to any pretended invention thereof by the said Carr or the said Bartholomew, the said several alleged improvements were well known to and practically used publicly by many persons in different parts of the United States, and, among other persons, to the following named persons at the places named:

At the Novelty Iron Works, in the city of New York, and at
25 other places in said city, and also at the city of Brooklyn, as will appear by the testimony of Isaac V. Holmes, of Cleveland, Ohio, and others whose names are not now known to these defendants.

Also, the same were known to and used by Robert Kirkup at Cincinnati, Ohio, where he now resides.

Also, the same were known to and publicly used by J. and H. Jones, in White street, New York city, as will appear from the testimony of William Nicoll, residing at 156 Tompkins avenue, Brooklyn, and by Charles Harrison, residing in the city of New York.

Also, the same were known to and publicly used by N. G. Garraty, at No. 439 3rd avenue, New York city, as will appear by the testimony of Patrick Madden, residing at Saint Louis, Missouri.

Also, that the same were so used at the "Planters' House,"
26 a hotel in St. Louis, Missouri, as will appear by the testimony of Timothy D. Turner, a resident of said city, at Saint Louis, and others at said city.

Also, that the improvements set forth and described in the letters patent, granted said Bartholemew, were publicly used and sold by one William S. Carr, in the city of New York, long anterior to the pretended invention thereof by the said Bartholomew, as will appear by the testimony of N. Sawyer, residing at No. 378 Hoyt street, Brooklyn, New York, and others, whose names are not now known to these defendants, and the same were also fully shown and described in certain letters patent of the United States granted said Carr August 5th, 1856, and reissued June 12th, 1860, and numbered No. 978.

Also, that the improvements claimed in said reissue No.
27 978 were fully shown and described in certain letters patent of the United States granted J. H. Bartholomew February 4th, 1854, and June 20th, 1854, and in letters patent of the United States granted Thomas Hanson March 20th, 1855, No. 12549, and

in the following English letters patent, No. 8971, granted George Hulme May 27th, 1841, James Hume, No. 781, dated November 19th, 1852; design No. 1633 for a piston cock, registered October 21st, 1848, by William Kirkwood; and also in a printed pamphlet published in London, England, and entitled as follows: "Lambert's Patent High Pressure Valve Cocks, class XXI, Thomas Lambert & Son, founders and machinists, manufacturers of block tin, &c., &c.;" and also in a certain other printed pamphlet published in Edinburgh, Scotland, entitled "Kirkwoods' Registered Water
28 Closets, Baths, &c.;" all of said letters patent and printed publication being long anterior to the date of the pretended invention of said Carr.

Also, that long anterior to the alleged invention of the said Carr of the improvements described and claimed in said letters patent No. 76398, and in the fourth claim thereof, the same were in public use in Cincinnati, Ohio, and Mount Vernon, Ohio, and in other parts of this country, which said uses were known to Frank Milward, of Ludlow, in the State of Kentucky, to I. V. Holmes, who resides in Cleveland, Ohio, and to John W. Hill, who resides at Dayton, Ohio; also, the same were so publicly used by one William Smith, at San Francisco, California, as will appear by the testimony of said Smith, George Milne, and Lawrence McNally, all of San Francisco aforesaid.

29 These defendants, further answering, say that they are informed and believe that the said several improvements in said several letters patents claimed were known to and publicly used prior to said alleged invention thereof by said Carr and Bartholomew, by other persons in the United States, whose names are not now known to these defendants, and they crave leave to set the same up in an amended answer when they shall have obtained definite information thereof.

Wherefore these defendants humbly submit and insist that under the facts and circumstances, as above alleged, the said complainants have no right to any further or other answer to said bill, or any part thereof, than is above given, and no right of injunction, account, or other relief prayed for in said bill, and they therefore ask
30 to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) EDWARD H. COLE.

SAM'L S. BOYD,
No. 421 *Olive St., St. Louis, D'f'ts' Sol'r.*

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Edward H. Cole, being duly sworn, for himself and his co-defendants, deposes and says that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except such matters and things as are therein mentioned on information and belief, and as to such matters he verily believes it to be true.

(Signed) EDWARD H. COLE.

Subscribed and sworn to before me, this 1st day of Sept., A. D. 1879.

(Signed) J. M. DEUELL,
U. S. Comm'r.

31 (Endorsed:) U. S. circ't ct., S. dist. N. Y. C. F. Blake & *al. vs.* Jno. Eaton & *al.* Answer. Sam'l S. Boyd, No. 421 Olive St., St. Louis, Mo., d'f'ts' sol'r. U. S. circuit court. Filed Sep. 1, 1879. John I. Davenport, clerk.

32 Circuit Court of the United States for the Southern District of New York. In Equity.

CHARLES F. BLAKE, Trustee, &c., *et als. vs.* JOHN EATON *et als.*

The replication of Charles F. Blake, trustee, &c., William S. Carr, and Sarah M. Bartholomew, complainants, to the answer of John Eaton, Edward W. Cole, William H. Cole, and Edward G. Burnham, defendants.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the defendants is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

CHARLES F. BLAKE,
Solicitor for Complainants, 16 *Murray St., New York City.*

Dated at New York city, the 3rd day of December, 1879.

33 (Endorsed:) U. S. circuit court, southern district of New York. In equity. Charles F. Blake, trustee, &c., *et als. vs.* John Eaton *et als.* Replication. U. S. circuit court. Filed Dec. 3, 1879. John I. Davenport, clerk. Charles F. Blake, solicitor for complainant.

34 United States Circuit Court, Southern District of New York. In Equity.

CHARLES F. BLAKE, as Trustee, &c., WILLIAM S. CARR, and SARAH M. BARTHOLOMEW

vs.

JOHN EATON, EDWARD H. COLE, WILLIAM H. COLE, and EDWARD G. BURNHAM.

Proofs on the part of the complainants for final hearing, taken before Edward G. Thompson, Esq., one of the standing examiners of this court, under and pursuant to notice.

NEW YORK, *December* 23*d*, 1879.

Present: Charles F. Blake, counsel for complainants.

S. S. Boyd, Esq., counsel for defendants, consents that the complainants may take their *prima facie* case in his absence, reserving to him all right of objection and cross-examination.

35 PHILLIPS ABBOTT, a witness called on behalf of the complainants, being first duly sworn, in answer to interrogatories propounded by Mr. Blake, says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Phillips Abbott; I am 29 years of age; I reside at 41 Pierrepont street, Brooklyn, New York; I am the managing clerk in the office of Charles F. Blake, Esq., 16 Murray street, New York city, counsel for the complainants herein.

2 Q. Have you ever purchased any water closet or water closets from Eaton, Cole & Burnham, of New York city?

A. No; I went to their store, 58 John street, New York city, on the 25th day of June, 1879, for the purpose of buying one of the closets sold by them, but I could not find any at their store.

3 Q. State fully what conversation, if any, took place between yourself and the person, or persons whom you saw at the defendants' store at the time of your visit there?

A. I saw Mr. Cole, who said he was a member of the firm; he further said they were for some time prior to about two years before my call—that is to say, prior to June, 1877—agents for Kupferle & Boisselier, and had sold the closets made by them; I asked Mr. Cole if he could show me one of the Kupferle & Boisselier water closets sold by them as such agents; he said he didn't think there was one in the store at the time, but he gave me permission to look for one, and instructed one of the porters to go with me and try to find one for me; the porter and I made a careful search, but we could not find any; Mr. Cole further admitted to me that the closets
36 sold by them were the regular Kupferle & Boisselier closet, and that the attachments thereto were the attachments usually sold with such closets.

Right of objection and cross-examination reserved for counsel for defendants.

PHILLIPS ABBOTT.

Subscribed and sworn to before me, this 23d day of December, 1879.

E. G. THOMPSON, *Examiner.*

Adjourned to Dec. 30, 1879, 11 a. m.

37 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Tuesday, the thirtieth day of November, in the year of our Lord one thousand eight hundred and eighty.

Present: Samuel Blatchford, circuit judge.

CHARLES F. BLAKE, Trustee, etc.
vs.
MCNAB AND HARLAN MANUFACTURING COMPANY.

THE SAME *vs.* JOHN EATON *et als.*

The above causes coming on for final hearing upon the pleadings and the same proofs:

Mr. Charles F. Blake is heard in behalf of the complainants.

Mr. Samuel S. Boyd is heard in behalf of the defendants.

C. A. V.

38 Circuit Court of the United States for the Southern District of New York.

CHARLES F. BLAKE and Others
vs.
THE MCNAB AND HARLAN MANUFACTURING COMPANY and JOHN HARLAN.

THE SAME *vs.* JOHN EATON and Others.

BLATCHFORD, *J.*:

This suit as presented involves two patents. One is a reissue, No. 978, granted to William S. Carr as inventor, June 12th, 1860, for "improvements in water closets," the original patent having been granted to him August 5th, 1856, and the reissue having been extended for 7 years from August 5th, 1870. Infringement of the third claim only at the reissue is alleged. The specification of the reissue says: The nature of my said invention consists in a peculiar
39 construction of cock, which is opened by the motion of the seat of the water closet, and allows but little water to run into the pan of the closet until the weight is removed from the seat, when the cock, gradually closing of itself, allows the water to run for a limited and regulated time, sufficient to wash out the basin. The third claim of the reissue is as follows: "In a valve for water closets a cup leather for controlling the motion of said valve in closing gradually substantially as specified, said cup leather moving freely in one direction, and closing against the containing cylinder in the other direction, and the leakage of water in said cylinder allowing the movement of said cylinder as set forth." The invention embodied in this claim is, in fact, a combination of a valve for a water closet with a variable chamber, and with a cup leather in such manner that the valve is caused to close slowly because the operation of the cup
40 leather as a tight packing prevents the passage of water, and is allowed to open rapidly because the operation of the cup leather as a valve permits the passage of water. The cup leather thus acts in one direction as a valve, and in the opposite direction as a packing. The variable chamber or cavity or cylinder has in it a piston with a cup leather on it centrally, and is provided with a small aperture which permits the gradual escape of water from it.

When the cavity is filed with water the valve is held on its seat by a spiral spring; when the valve stem is depressed the valve

is opened rapidly, because the cup leather then acts as a valve and permits the water to pass freely outside of it. When the force which depressed the valve stem is removed the spring acts to shut the valve, but shuts it slowly, because the cup leather acts as a tight packing, being forced by the pressure of the water outwards against the wall of the cavity. Therefore the water can escape only
41 slowly from the cavity through the said small aperture, and the valve cannot move faster to shut than it is allowed to move by the escape of the water through said small aperture. The defendant's water closet has a contrivance, the mode of operation of which is substantially the same as that of Carr. It has a variable chamber, a cup leather which acts in one direction as a packing and in the opposite direction as a valve, and it has a small aperture in the variable chamber which permits a small flow of water therefrom while the valve is closing. The cup leather controls the motion of the valve in closing gradually; it moves freely in one direction, and closes against the wall of the containing chamber in the other direction, and the leakage of water in said chamber allows the movement of the cup leather. There is clearly an infringement of the third claim unless the particular arrangement of the
42 apertures through which the water escapes from the variable chamber is an element of that claim. In the specification of Carr's reissue it is said that leakage at the washer thorough which the stem of the supply cock passes will in some cases be adequate to make the closing of the valve sufficiently gradual, but that he proposes to use a screw entered through the cap of the chamber with a head next said washer, and part of one side of the screw filed away so as to adjust the amount of leakage. In the defendant's apparatus there is a small hole in the side of the chamber near the end thereof where the plunger enters, connecting by a small enclosed channel with the portion of the chamber beyond the cup leather. The plunger and stem in the defendant's apparatus are no more than the stem in Carr's. The differences in the escape channels are formal and not substantial.

43 The defendants contend that the cup leather of Carr does not control the motion of the valve in closing gradually, and that it simply acts as a packing, during the closing of the valve, to entirely prevent any closing, by preventing the water from passing from above. But the language of the claim, in connection with the descriptive part of the specification, is that the action of the cup leather as a packing, and its gradual movement, permitted by the slow escape of the water from above it, control the movement of the valve in closing gradually.

On the question of novelty, or as affecting the construction of the said third claim, the defendants adduce English letters patent No. 8971, granted to George Hulme for "Improvements in water closets," the specification of which bears date November 27th, 1841. But no witness for the defendants testifies to the existence in Hulme
44 of what is found in the third claim of Carr. There is no cup leather in Hulme. Hulme's device is one for keeping a valve open for any required length of time for the supply of water

to the basin of the water closet. He has a bucket with a central poppet valve. In place of that the defendants use a cup leather.

The defendants take the position that a central valve alone was old; that a cup leather alone was old; that a poppet valve in combination with a cup leather was old; that Hulme had a bucket or plunger with a central poppet valve and a means of regulating the escape of the water from above the plunger; that such means of escape in the defendants' apparatus is the same as in Hulme; and that, in view of these considerations, the third claim of the Carr reissue must be limited to the special mode of escape shown by Carr. But, although the defend-
45 ants use Hulme's mode of escape, they do not use his plunger with its poppet valve, but use instead a cup leather, and thus use Carr's combination. It is very clear that the cup leather does not have the same mode of operation as the poppet valve, and that the points of advantage in it must be just the reasons why the defendants use it and do not use the poppet valve arrangement of Hulme in connection with Hulme's mode of escape. Nor does it avail to show the prior existence in Kirkwood of a mode of regulating the supply of water by an arrangement for the gradual escape of the water from above the plunger, so long as the arrangement set forth in the third claim of the reissue is not found in Kirkwood.

The other patent sued on is No. 21,734, granted to Frederic H. Bartholomew, October 12th, 1858, for an "improved water closet," and extended for 7 years from October 12th, 1872. The first
46 claim of that patent is alleged to have been infringed. It is as follows: "The use of a drip-box or leak chamber arranged above the closet, and below and around the supply-cock, substantially as described." The specification says that "the nature of the invention consists in providing for water closets a cistern or drip or leak chamber, arranged upon the top of or over the tank of a closet, and placing a supply cock within or about said drip-box or cistern, so that any waste or drip or leak from the cock shall be conducted into the tank, so as to insure the keeping of the floor dry." The drip-box is described and shown as arranged upon the top plate of the closet, by being cast upon the top plate, and as having the supply cock within it, and it is set forth that any leakage about the cock will drop into the closet. The leakage from the joints of the supply cock must fall into the drip-box, and thence into the trunk
47 and the soil pipe, and not fall on the floor. The defendants' apparatus has a trunk and a supply cock and a drip-box, arranged below and around the supply cock, but the drip-box is cast upon the side of the trunk, near its top, and not upon its top. The drip goes into the drip-box and thence into the trunk and the soil pipe. The question is whether the change of the position of the drip-box is formal or substantial.

It is contended for the defendants that it was not new to have a drip-box, or to have a pipe for conveying away drippings in machinery from a drip-box, arranged in connection with a cock or valve, or to have a drip-cup applied to the valve of a water closet, the leakage from the valve falling into a saucer and thence finding its way through a hole

into the inside of the trunk; that a valve on the floor at the foot of the trunk was old, and so was a valve attached to the trunk and
48 below its top, and a valve above the top; that it was old to have in connection with a valve or drip-pan conducting the drip into the soil pipe at the foot of the trunk, and also to have a valve on top of the trunk, a provision, by means of a hollow arm, for conducting the drip into the trunk, and that, in view of all this, the first claim of the Bartholomew patent cannot be held to cover the defendants' drip-cup arrangement. But the evidence of the plaintiffs' expert, as to two water-closet drip arrangements, respecting which the defendants introduced testimony, namely, that Kirkup and the Scotch closet of Nicoll and Harrison, shows that they were not alike, either Carr's or the defendants'. In the Turner and Madden arrangements the douces were on the floor, and the drip ran into the said pipe below the trunk. No arrangement is shown, before Bartholomew, in the same place as his with reference to
49 the other parts of the closet, and to the work it has to do, and to the supply cock, and to the drip it catches, and doing the same work and catching the same drip as his does and as the defendants' does. There is nothing in the state of the art which requires such a construction to be given to the words "above the closet" as will not make the defendants' drip-box substantially above the closet, although not cast on the cover, but on the side near the top. There is the same operation of the same parts, acting in combination with each other, and attaining the same result. This is the testimony of the plaintiffs' expert, and it is not contradicted. It must therefore be held that the defendants have infringed the first claim of No. 21,734.

In a suit before Judge McKennan, the validity of the two claims above considered was sustained, but in deciding the case no written opinion was given. In a suit in Missouri against Boiselier
50 and Kupferle, involving the said claims and a closet like that of the defendants in these cases, the bill was dismissed, but on what grounds does not appear from the decision of the court. In regard to any supposed effect of the decree in that suit as a bar in favor of the defendants in these suits, it is sufficient to say that no proceedings in that suit are set up in the answers in these suits.

There must be decrees for the plaintiffs as to the above claims, and for an account of profits, and an ascertainment of damages, with costs.

C. F. BLAKE,
For the Plaintiffs.
S. S. BOYD,
For the Defendants.

(Endorsed:) Circuit court of the United States for the southern district of New York. Charles & F. Blake and others *vs.* The McNab & Harlan M'f'g Co. and another. Decision Feb. 15, 1881. U. S. circuit court. Filed Feb. 15, 1881. Joseph M. Denel, clerk.

51 United States Circuit Court, Southern District of New York.
In Equity.

CHARLES F. BLAKE, Trustee, &c., WILLIAM S. CARR, and SARAH BARTHOLOMEW
against
JOHN EATON, EDWARD H. COLE, and EDWARD G. BURNHAM.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

EDWARD G. THOMPSON, being duly sworn, says: I am of full age, reside in the city of New York, and am a member of the firm of Wetmore, Jenner & Thompson, solicitor and counsel for the complainant herein.

On or about the 20th day of September, 1880, William S. Carr, one of the complainants herein, departed this life at the city of New
York, leaving a last will and testament, and by his last will
52 and testament he appointed his wife, Clara E. Carr, and George D. Scott his executrix and executor, respectively.

Thereafter the said last will and testament was duly admitted to probate, and the said Clara E. Carr and George D. Scott duly qualified as executrix and executor thereunder, respectively.

That on or about the 21st day of February, 1881, Charles F. Blake, the then trustee for his co-complainants, William S. Carr and Sarah Bartholomew, and one of the complainants herein as such trustee, departed this life at the city of New York, and that by his death the trust held by him lapsed.

That thereafter, and on or about the 14th day of March, 1881, deponent, by a duly drawn, executed and delivered instrument in writing, and under seal, was appointed by said Clara E. Carr and
George D. Scott, executrix and executor, as aforesaid, and by
53 said Sarah Bartholomew, trustee for them in the place and stead of said Charles F. Blake, deceased, and that thereupon deponent accepted the said trust and acted under the same; and that thereupon the title to the letters patent here in suit was assigned to deponent in trust.

Wherefore deponent prays that the order hereto attached may be made herein reviving this suit and making deponent, as trustee, and Clara E. Carr, executrix, and George D. Scott, executor, respectively, of said William S. Carr and Sarah M. Bartholomew, parties complainant in the place and stead of the present complainants, and that all the proceedings herein stand.

(Signed) E. G. THOMPSON.

Sworn to before me, this 12 day of October, 1881.
[SEAL.] PHILLIPS ABBOTT,
Notary Public, Kings & New York Co's, State of New York.

54 At a stated term of the circuit court of the United States in and for the southern district of New York, held at the city of New York on this 21st day of October, 1881.

Present: The Honorable Samuel Blatchford, circuit judge.

CHARLES F. BLAKE, Trustee, &c., WILLIAM S. CARR, and SARAH BARTHOLOMEW

vs.

JOHN EATON, EDWARD H. COLE, WILLIAM H. COLE, and EDWARD G. BURNHAM.

On reading and filing the hereto annexed affidavit of Edward G. Thompson, and the annexed consent of the solicitors for the plaintiffs and defendants, and on due consideration thereof, it is hereby ordered—

That this case stand revived with Edward G. Thompson,
55 trustee of Clara E. Carr and George D. Scott, executrix and executor of the last will and testament of William S. Carr, and Clara E. Carr, and George D. Scott, as such executrix and executor respectively, and Sarah Bartholomew, parties complainant in the place and stead of Charles F. Blake, trustee, &c., William S. Carr, and Sarah Bartholomew, the present complainants, and that all the proceedings herein stand.

(Signed) SAM'L BLATCHFORD.

Approved as to form and substance, and may be filed and entered.

SAM'L S. BOYD, *Df'ts' Sol'r.*

WETMORE, JENNER & THOMPSON,
Compl'ts' Sol'r-.

(Endorsed:) United States circuit court, southern dist. of
56 New York. Charles F. Blake, trustee, etc., William S. Carr and Sarah Bartholomew *vs.* John Eaton, Edward H. Cole, William H. Cole, and Edward G. Burnham. Affidavit and order. U. S. circuit court. Filed Oct. 24, 1881. Joseph M. Deuel, clerk.

57 At a stated term of the circuit court of the United States in and for the southern district of New York, held at the city of New York on the 28th day of October, 1881.

Present: The Honorable Samuel Blatchford, circuit judge.

EDWARD G. THOMPSON, Trustee, &c., *& als.*

vs.

JOHN EATON, EDWARD H. COLE, WILLIAM H. COLE, and EDWARD G. BURNHAM.

This cause came on to be heard at this term of said court, and was argued by counsel for the respective parties, and thereupon and upon consideration thereof it is found and hereby ordered, adjudged, and decreed that the reissued letters patent granted to William
58 S. Carr, dated the 12th day of June, 1860, No. 978, for an "improvement in water closets," and extended on the 5th day of August, 1870, and the letters patent granted to Frederick H. Bartholomew, dated the 12th day of October, 1858, numbered 21734, for an "improved water closet, and extended on the 12th day of October, 1872, on which this suit is brought, are, respectively, good and valid in law; that the said Carr and the said Bartholomew are, re-

spectively, the original and first inventors of the respective inventions described and claimed in said reissued and original letters patent, respectively; that the title thereto, respectively, and to the invention described and claimed therein, respectively, is vested in the complainant, Edward G. Thompson, as trustee for Sarah Bartholomew, and for Clara E. Carr and George D. Scott, executrix
59 and executor under the last will and testament of William S. Carr, deceased, the said Edward G. Thompson being the successor of the former complainant, Charles F. Blake, deceased, trustee for the said Sarah Bartholomew and for William S. Carr, deceased, and that the defendants have infringed the 3rd claim of said reissued letters patent 978 and the 1st claim of said original letters patent No. 21734, and the exclusive right of the complainants under the same.

And it is further ordered, adjudged, and decreed that the complainant, Edward G. Thompson, as such trustee, do recover from the defendants the profits, gains, and advantages which the said defendants have received or made, or which have arisen or accrued to them by reason of any infringement by said defendants of the said original letters patent No. 21734 since the 12th day of October, 1858,
60 and said reissued letters patent No. 978 since the 12th day of June, 1860, and also the damages which the complainants have sustained by reason of said infringement, to be assessed as provided by statute.

And it is further ordered, adjudged, and decreed that the said complainant, Edward G. Thompson, as such trustee, do recover of the defendants the complainant's costs and charges and disbursements in this suit to be taxed.

And it is further ordered, adjudged, and decreed that it be referred to Francis Howland, of number 11 Pine street, in the city of New York, as master *pro hac vice* of this court, to ascertain and take, and state and report to the court an account of the gains, profits, and advantages which the said defendants have received, or which have arisen or accrued to them by reason of any infringement by them of the 1st claim of said original letters patent No. 21734 since
61 the 12th day of October, 1858, and of the 3rd claim of the said reissued letters patent 978 since the 12th day of June, 1860, and also to assess the damages suffered by the complainants herein by reason of any infringement by said defendants since the 27th day of March, 1872.

And it is further ordered, adjudged, and decreed that the complainants, on such accounting, have the right to cause an examination of the said defendants' ore terms, or otherwise, and also the production of the books, vouchers, and documents of said defendants, and that the said defendants attend for such purpose before said master, from time to time, as said master shall direct.

(Signed) SAM'L BLATCHFORD.

62 I hereby approve the form and contents of the above decree, and it may be filed and entered.

SAM'L S. BOYD,
Solicitor for Deft's.
WETMORE, JENNER & THOMPSON,
Solr's for Compl'ts.

(Endorsed:) U. S. circuit court, southern district of N. Y. Edward G. Thompson, trustee, &c., *et als. vs.* John Eaton, Edward H. Cole, William H. Cole, and Edward C. Burnham. Interlocutory decree. Sir: Please take notice that we shall present the within decree to this court on the 28th day of October, 1881, at 11 o'clock
63 a. m., for settlement. Wetmore, Jenner & Thompson, solicitors for compl't. To S. S. Boyd, Esq., solicitor for def'ts. U. S. circuit court. Filed Oct. 29, 1881. Joseph M. Deuel, clerk.

64 At a stated term of the circuit court of the United States in and for the second circuit and southern district of New York, held at the city of New York on the 21st day of January, 1882—

Present: The Honorable Samuel Blatchford, circuit judge.

EDWARD G. THOMPSON, Trustee, &c., WILLIAM S. CARR, and SARAH BARTHOLOMEW
vs.
JOHN EATON, EDWARD H. COLE, and EDWARD G. BURNHAM.

This cause heretofore and at the October term, 1880, came on to be heard by the court, and was argued by counsel, and thereafter and on or about the 29 day of October, 1881, an interlocutory
65 decree was filed herein in favor of complainants, awarding them an account for profits and damages, and their costs to be taxed. Thereafter the parties agreed that the damages suffered by the complainants by reason of the infringment of the defendants was four hundred and fifteen dollars, and that the taxable costs payable by defendants to complainants, was one hundred and one $\frac{24}{100}$ dollars.

Now, therefore, on consideration thereof, it is hereby ordered, adjudged, and decreed that the defendants pay to the complainants the sum of four hundred and fifteen dollars damages, and one hundred and one $\frac{24}{100}$ dollars costs, making in all the sum of five hundred and sixteen dollars and twenty four cents; and that the complainants have execution for the said sum, to wit, five hundred
66 and sixteen dollars and twenty-four cents ($516.24).

SAM'L BLATCHFORD.

Approved as to form and substance, and may be filed and entered.
WETMORE, JENNER & THOMPSON,
Sol's for Compl'ts.
SAM'L S. BOYD, *Sol'r for Def'ts.*

(Endorsed:) U. S. C. C., S. D. N. Y. In equity. Edward G. Thompson, trustee, &c., *et als. vs.* John Eaton *et als.* Decree. Wet-

more, Jenner & Thompson, 206 Broadway, New York city. U. S. circuit court. Filed Jan. 21, 1882. Joseph M. Deuel, clerk.

67 United States Circuit Court, Southern District of New York.
Equity.

E. G. THOMPSON, Trustee, *et al.*, Appellees,
vs.
JOHN EATON, *et al.*, Appellants.

To the honorable the Supreme Court of the United States:

The appeal of the defendants, appellants, respectfully showeth that upon the 7th day of July, 1879, the bill of complaint therein was filed, alleging that the defendants had infringed letters patent of the United States granted William S. Carr, dated the 12th day of June, 1860, being reissue numbered 9878; also upon letters patent of the United States granted F. H. Bartholomew October 12th, 1858, and numbered 21734; and said bill of complaint prayed
68 for an account, profits and damages, and for writs of subpœna and injunction; that said defendants appeared, by counsel, Samuel S. Boyd, Esq., on or about the first day of August, 1879, and on or about the first day of September, 1879, defendants filed their answer, and on or about the 1st day of October replication was filed.

That thereafter the cause was argued before his honor, Judge Blatchford, on a record for complainants and defendants, and on or about the 15th day of February, 1881, a decree was entered herein sustaining the validity of said several letters patent, and ordering an account and damages; that thereupon, by agreement of counsel, the damages were assessed at $1,200, and costs at $118.74, and a final decree was entered for the whole sum of $1,318.74.

69 Wherefore appellants appeal from the whole of said decree of said circuit court, except the amount of damages and costs, and respectfully pray that the decree of said circuit court and the pleadings, record, evidence, proceedings, stipulations, and exhibits in said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the decree of said circuit court, and every part thereof, may be reversed, and a decree made reversing said decree of said circuit court, with costs, and such other decree as to the said Supreme Court shall seem just.

SAM'L S. BOYD,
Sol'r & Counsel for Def'ts, Appellants.

St. Louis, May 15, 1882.

70 Appeal allowed January 21st, 1882.
SAM'L BLATCHFORD.

(Endorsed:) U. S. circ't c't, so. dist. N. Y. E. G. Thompson, trustee, *et al. vs.* John Eaton *et al.* Equity. Petition for appeal. Service of copy of petition admitted Jan'y 24, 1882. Wetmore, Jenner & Thompson, for appellees. Sam'l S. Boyd, St. Louis, d'f'ts' counsel. U. S. circuit court. Filed Jan. 21, 1882. Joseph M. Deuel, clerk.

71 United States Circuit Court, Southern District of New York.
Equity.

E. G. THOMPSON, Trustee, *et al. vs.* JOHN EATON *et al.*

It is hereby stipulated and agreed, in consideration of a like waiver on the part of the appellants herein, in the case of these complainants against E. E. Boisselin *et al.*, pending in the United States circuit court, eastern district of Missouri, about to be appealed to the U. S. Supreme Court, that all bond to the appellee herein on appeal of this case to said Supreme Court of the United States is waived, and that such appeal shall work a supersedeas without bond.

WETMORE, JENNER & THOMPSON,
Sol'rs for Appellees, Complainants.

New York, January 20th, 1882.

72 [Endorsed:] U. S. circ't c't, so. dist. N. Y. E. G. Thompson *et al. vs.* John Eaton *et al.* Equity. Waiver of bond on appeal. Sam'l S. Boyd' d'f'ts' sol'r, St. Louis. U. S. circuit court. Filed January 21, 1882. Joseph M. Deuel, clerk.

73 United States Circuit Court, Southern District of New York

E. G. THOMPSON, Trustee, *et al.*
vs.
JOHN EATON *et al.* } Equity.

It is hereby stipulated and agreed by and between counsel for the respective parties herein that the record in the case of these complainants against E. E. Boisselin *et al.*, pending in the United States circuit court, eastern district of Missouri, and numbered 965, on appeal to the U. S. Supreme Court, shall, so far as the same shall apply to this case, stand, remain, and be the records of the complainants and defendants herein before the said Supreme Court on appeal with the same force and effect as though the same had been separately made up as the record on appeal herein.

WETMORE, JENNER & THOMPSON,
Sol'rs for Compl'ts.

74 SAM'L S. BOYD,
Sol'r & Counsel for D'f'ts herein.

(Endorsed:) U. S. circ't c't, so. dist. N. Y. E. G. Thompson *et al. vs.* John Eaton *et al.* Equity. Stipulation as to record on appeal. U. S. circuit court. Filed Jan. 21, 1882. Joseph M Deuel, clerk.

75 U. S. Circuit Court, Southern District of New York.

EDWARD G. THOMPSON, Trustee, *et al. vs.* JOHN EATON *et al.*

We hereby consent that the foregoing papers shall constitute the record to be sent by the clerk of the circuit court of the United States for the southern district of New York to the United States

Supreme Court on the appeal to said court in the above-entitled cause.

New York, February 11th, 1882.

WETMORE, JENNER & THOMPSON,
Sol's for Compl't.

SAM'L S. BOYD, *D'f'ts' Sol'r.*

Endorsed: U. S. circuit court. Filed Feb. 28th, 1882. Joseph M. Deuel, clerk.

76 By the Honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, to Edward G. Thompson, trustee; Clara E. Carr, George D. Scott, as executrix and executor, and Sarah Bartholomew:

Whereas John Eaton, Edward H. Cole, William H. Cole, and Edward G. Burnham have lately appealed to the United States Supreme Court from a decree lately rendered in the United States circuit court for the southern district of New York, made in favor of you, the said Edward G. Thompson, trustee; Clara E. Carr & George D. Scott, as executrix and executor, & Sarah Bartholomew, and all bond on appeal has been waived by the appellees, you are hereby cited to appear before the said Supreme Court, at the city of Washington, on the 2nd Monday of October next, to do and receive
77 what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York in the 2nd circuit, the 21st day of January, in the year of our Lord 1882.

(Signed) SAM'L BLATCHFORD.

(Endorsed:) U. S. circ't c't, so. dist. N. Y. E. G. Thompson *et al. vs.* John Eaton *et al.* Equity. Citation. Service of a copy of citation admitted. Jan'y 24, 1882. Wetmore, Jenner & Thompson, for appellees.

78 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York in the second circuit, do hereby certify that the foregoing pages, numbered from one to seventy-seven, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Edward G. Thompson, trustee; Clara E. Carr and George D. Scott, as executrix and executor, and Sarah Bartholomew, appellees, against John Eaton, Edward H. Cole, William H. Cole, and Edward G. Burnham, appellants, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York in the second circuit, this third day of March, in the

year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the said United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL.

Endorsed on cover: S. New York C. C. U. S. No. 197. John Eaton, Edward H. Cole, William H. Cole, and Edward G. Burnham, appellants, *vs.* Edward G. Thompson, trustee for Clara E. Carr, executrix, and George D. Scott, executor of William S. Carr, deceased, and Sarah Bartholomew. Filed 18th April, 1882.

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Office Supreme Court U. S.
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JAN 22 1885
JAMES H. McKENNEY.
CLERK.

APPELLANTS' BRIEF.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1884.

No. 182.

EDWARD G. THOMPSON, TRUSTEE FOR CLARA E. CARR, EXECUTRIX, AND GEORGE D. SCOTT, EXECUTOR OF WILLIAM S. CARR, DECEASED, AND SARAH BARTHOLOMEW,

Appellants,

VS.

ELIZABETH E. BOISSELIER AND JOHN C. KUPFERLE.

G. G. FRELINGHUYSEN,
EDMUND WETMORE,
Of Counsel with Appellants.

ON CARR PATENT.

Supreme Court of the United States.

EDWARD G. THOMPSON, Trustee for Clara E. Carr, Executrix, and GEORGE D. SCOTT, Executor of William S. Carr, deceased, and SARAH BARTHOLOMEW,
Appellants,

vs.

ELIZ. E. BOISSELIER and JOHN C. KUPFERLE,
Defendants, Appellees.

No. 189.

Brief for Appellants.

This appeal is brought from a decree of the United States Circuit Court, for the Eastern District of Missouri, dismissing the bill of complaint.

The bill was filed 15th February, 1877, by Charles F. Blade, trustee, for infringement of Letters Patent No. 978, reissued 12th of June, 1860; the original was issued August 5th, 1856, and extended for seven years on the 5th of August, 1870, and assigned to Charles M. Keller and Charles F. Blake, trustees, March 27th, 1872.

By the death of Mr. Keller, Mr. Blake became sole trustee before the filing of the bill herein.

After the death of Mr. Blake in 1881, Mr. Thompson was appointed trustee, and the case revived and continued by order of Court in the name of the parties hereto.

By stipulation the records in the cases. Same Complainants vs. Same Defendants, No. 190; The McNab & Harlan Mfg. Co. vs. Thompson, etc., No. 196; John Eaton *et al.* vs. Thompson, etc., No. 197, on appeal to this Court; and portions of the record in Blake, Trustee, vs. Kirk, and Blake, Trustee, vs. Gibson, are all made part of the record in this case. And are printed in this record, excepting small portions of the records in the Supreme Court cases.

The defenses set up by the answer were:

1st. Non-infringement.

2d. Invalidity of the reissue.

3d. Want of novelty on account of alleged prior knowledge of the patented invention, and because of certain specified prior patents.

No written opinion was delivered by the Court below.

The decree was as follows:

* * * "That the said reissued letters patent in "the bill of complaint set forth are not good and valid "in law, that the bill of complaint herein be and the "same is dismissed," &c.

Grounds of Appeal.

The decree appealed from is erroneous because, as appellants submit,

1st. Reissue No. 978 is good and valid in law.

2d. The invention described in the letters patent in suit is not void for want of novelty.

3d. The defendants were proved to have infringed.

I.

The Carr Reissue, on which this suit is brought, is printed at p. 42, Rec. No. 189.

The invention patented is for an improvement in water closets, and relates to the water-cock that regulates the flow of fresh water into the closet.

The specification states:

"The nature of my said invention consists in a peculiar construction of cock, which is opened by the motion of the seat of the water-closet, and allows but little water to run into the pan of the closet until the weight is removed from the seat, when the cock, gradually closing of itself, allows the water to run for a limited and regulated time, sufficient to wash out the basin."

The construction of the cock as described by his Honor Judge BLATCHFORD in his opinion in the suit vs. The McNab & Harlan Co., is shown to consist of:

"A combination of a valve for a water-closet with a variable chamber, and with a cup-leather in such manner that the valve is caused to close slowly, because the operation of the cup-leather as a tight packing prevents the passage of water, and is allowed to open rapidly because the operation of the cup-leather as a valve permits the passage of water. The cup-leather thus acts in one direction as a valve, and in the opposite direction as a packing. The variable chamber or cavity or cylinder has in it a piston with a cup-leather on it centrally, and is provided with a small aperture which permits the gradual escape of water from it."

"When the cavity is filled with water the valve is held on its seat by a spiral spring; when the valve stem is depressed the valve is opened rapidly, because the cup-leather then acts as a valve and permits the water to pass freely outside of it. When

" the force which depressed the valve stem is removed
" the spring acts to shut the valve, but shuts it slowly,
" because the cup-leather acts as a tight packing be-
" ing forced by the pressure of the water outwards
" against the wall of the cavity. Therefore the water
" can escape only slowly from the cavity through the
" said small aperture, and the valve cannot move faster
" to shut than it is allowed to move by the escape of
" the water through said small aperture."

The only claim involved in this sait is the third claim, which is as follows :

" I claim in a valve for water-closets a cup-leather
" for controlling the motion of said valve in closing
" gradually, substantially as specified, said cup-leather
" moving freely in one direction, and closing against
" the containing cylinder in the other direction, and
" the leakage of water in said cylinder allowing the
" movement of said cup-leather, as set forth."

II. Defense.

First. The defense that the re-issue is invalid as for a different invention from the original cannot be considered, because the original patent was not offered in evidence and is not in the record.

Osborne vs. Seymour, 11 Wallace, 516.

Second. Defense of want of novelty. Several alleged anticipations were introduced in evidence by the defendants. None of them show the invention in controversy.

These will be considered *seriatim*.

1. Kirkwood's invention.

This is shown in the patent, design and extract from " Practical Mechanical Journal."

Rec. No. 189, pp. 98 to 100.

In this contrivance the valve is made cylindrical, with the valve seat at one end of the cylinder, and the inlet pipe is at the side of the cylinder, near the valve seat; the valve consists of a cylindrical plunger, which fits closely within the cylinder, one end of which makes a close joint with the valve seat when closed on it; in this plunger is a central round opening, in one end of which a valve fits, which valve is rigidly attached to a valve stem which passes through the plunger and then through the shell of the valve. The rod is made triangular in cross section, where it passes through the plunger, and has on it a shoulder above the plunger, in such position as to allow a slight movement longitudinally of the rod in the plunger, so as to close the small central valve when in one position, and open it when in the other. A small lateral passage way connects the supply pipe with the closed end of the cylinder, in which passage way there is a regulating cock.

A spiral spring about the rod keeps both valves normally on their seats. To open the valve pressure is applied to the stem, which forces the smaller valve from its seat, brings the shoulder on the rod against the plunger, and pushes the plunger into the closed cylinder, the small valve being open to allow escape of water from the cylinder at the time. When the pressure is removed from the rod, the spring pressing on the rod quickly closes the small valve, and tends to return the large valve to its seat, but is retarded by the smallness of the lateral passage through which water enters to fill the cylinder, as the plunger is withdrawn from it to its seat at a rate regulated by the cock in the lateral passage.

This does not anticipate the patented invention, because

It has no cup leather.

Operates in directly the reverse manner from that described in the Carr patent. In the latter the fluid is forced from the chamber by the closing of the valve

under the action of the spring, and in the Kirkwood the fluid is drawn into the chamber.

The Carr is much simpler, and does away with the small valve at the centre and the lateral passage way.

No evidence was offered by the defendants to prove this an anticipation of the patented invention beyond the introduction of the description and drawings.

Clearly it does not disclose the patented invention.

2. Hulme Patent Rec. No. 189, p. 101.

This patent shows a leather used as a packing to a plunger in a pump to make it fit the cylinder. The pump is a double acting pump, having two valves, one opening inward, the other outward, in a valve chest below the piston, connected with the cylinder, and a valve chest, with two valves, one opening inward, the other outward, connecting with the cylinder above the piston. To be operative the piston must be solid; it is so shown and described as a piston.

It is essential to the Carr patent that the cup leather should act both as a packing and a valve.

Renwick Rec. No. 189, p. 69.

This device clearly does not anticipate Carr's invention, and no witness was found to testify that it did so.

3. Hulme Patent Rec. No. 189, p. 96.

Within the cylindrical shell of a valve above the valve seat is fitted on the valve-rod a plunger through which openings are made provided with a poppet valve so as to be opened freely by pressure from the lower side of the plunger; the valve is on the rod at a lower point; a spring or weight keeps the valve normally toits seat, and the plunger down in the cylinder. The upper end of the cylindrical shell is closed excepting a connection with the outlet pipe, through a lateral passage, which is provided with a regulating cock.

The valve is opened by pressing down the rod which moves the valve from its seat, and the poppet valve freely admits water to the closed end of the cylinder. When the pressure is removed the weight tends to close the valve to its seat, but is prevented by the water in the cylinder which cannot pass the valve by which it freely entered, and is gradually forced through the lateral passage ; the valve does not reach its seat until sufficient water has passed to allow it so to do.

This patent shows no cup-leather, but a plunger with a valve in the centre. The Carr device is much simpler, does away with the small valve and the lateral passage way has a cup-leather and no plunger.

No testimony was introduced concerning this device that it anticipated the Carr patent, and it is clear that no such testimony could have been introduced.

The foregoing are the only anticipations attempted to be proved by the defendants. They clearly fail to maintain the defense of want of novelty.

The witnesses called by defendants testified to the use of cup leathers in pumps, and that slowly closing valves made so by a variable chamber were old at the date of the patent. No testimony was given that any of the devices anticipated the invention covered by the third claim.

"Anticipation is not proven by showing the different parts in separate patents, machines," &c.

Imhauser vs. Buerk, 101 U. S., 647.

III. Infringement.

The defendants' device claimed to infringe is marked "Exhibit Kupferle & Boisselier Supply Cock."

No dispute is made that the defendants made and sold the article before commencement of the suit.

Mr. Renwick's testimony, for the complainants, in which he compares the defendants' structure with the patented invention, will be found at pp. 67, *et seq.*, of Record No. 189.

This testimony taken in the case against Gibson and in this case by stipulation refers to defendants' article as "Exhibit A."

"4 Q. Have you read and do you understand the letters patent of the United States Reissue No. 978, granted to William S. Carr, Complainant's Exhibit B, in this case?

"A. I have several times examined the reissued letters patent named in the question, and believe I understand the contents thereof and the inventions specified therein.

"5 Q. Please examine the water-closet of Defendant's Exhibit A, and compare it with said letters patent in regard to the invention described therein, and referred to in the third claim thereof, and state whether or not the construction and mode of operation of said exhibit is substantially the same as is described in said Reissue No. 978, and referred to in the third claim thereof, giving your reasons for any opinion you may express.

"A. I have frequently examined the water-closet of Defendants' Exhibit A, and believe it contains the inventions described in Reissue No. 978, and referred to in the third claim thereof; the invention referred to in the third claim of said patent is in fact a combination of a valve for a water-closet, with a variable chamber, and with a cup-leather in such manner that the valve is caused to close slowly by the operation of the cup-leather as a tight packing, preventing the passage of water, and is permitted to open rapidly on account of the cup-leather acting as a valve which opens to permit the passage of water.

"In the variable chamber described in the patent granted to Bartholomew, before referred to, there is a tight-packed diaphragm and a small valve, the valve

being used either to permit the entrance of the water into the variable chamber, or allow of the egress from the variable chamber; in the construction described in the Carr patent, now in question, the cup-leather acts both as a valve and packing; in this Carr patent the cavity of the variable chamber is shown in the upper part of figure 3; it is provided with a piston, with a cup-leather shown at *m*, and with a small aperture alongside of the screw 9, which aperture permits the gradual escape of water from the chamber; the valve is shown at *g*. All parts of the cavity shown in figure 3 are filled with water when the contrivance is ready for operation, and the valve is held upon its seat by the spiral spring *i*. When the valve-stem *h* is depressed the valve is opened rapidly, owing to the fact that the cup-leather then acts as a valve, and permits water to pass it freely. When the force which depressed the valve-stem is removed, then the spring *i* tries to shut the valve, and finally does close it, but shuts it very slowly, owing to the fact that the cup-leather now acts as a tight packing, being forced by the pressure of the water against the wall of the variable chamber; therefore the water can only escape from the variable chamber slowly through the small orifice alongside of the screw 9, and the shutting of the valve is controlled and retarded, so that it cannot move faster than the escape through this small aperture permits it to move.

"The effect produced by this construction is the same as the effect produced in the Bartholomew patent before referred to, namely, to insure a considerable flow of water into the basin of the closet.

"In the defendants' closet, Complainants' Exhibit A, there is a brass casting, before referred to, attached to the side of the receiver, substantially as shown in the Carr patent. This brass casting of the defendants has at its lower part a cavity, whose walls partially bound the variable chamber. This cavity is a cup-shaped piece

of brass screwed to the bottom of the casting. A cylindrical brass plunger enters this cavity, and the upper end of it is formed into a valve. This brass plunger is packed to the top of the cavity by a cup leather, which is secured between the upper part of the brass cup and an internal flange on the brass casting. The stem of the plunger and valve is surrounded by a coiled brass spring, which always tends to lift the plunger and shut the valve.

"The plunger has also a small nick or groove cut in its periphery, and extending from the top to the botton of the plunger. When this contrivance is ready for operation, all parts of the cavity in the brass casting, including the variable chamber, are filled with water, and the valve is held on its seat by the spiral spring, the plunger then being in its highest position.

"When it is desired to open the valve, force is applied to depress the valve stem, this force compresses the spring, depresses the plunger, and opens the valve quickly, owing to the fact that the water can escape rapidly from the variable chamber, such rapid escape being due to the operation of the cup leather, which now ceases to hug the plunger and acts as a valve, permitting the water to escape freely from the variable chamber. When the force which was applied to depress the stem and open the valve is removed, then the spring strives to shut the valve and elevate the plunger, and as soon as it commences to elevate the plunger, the pressure of water causes the cup-leather to hug the plunger tightly, so that it ceases to act as a valve, and becomes a tight packing. As soon as this occurs, water can only enter the chamber through the small groove in the periphery of the plunger, and the valve can shut no faster than this small flow of water permits it to shut. The mode of operation of this contrivance is therefore precisely the same as that described in the patent of Carr. It has a variable chamber, the same as Carr's; it has a cup-leather, which at one time acts as a

packing and at the other as a valve, which is the same as Carr's; it has a small orifice, which permits the passage of water when the valve is closing, which is the same as Carr's; and it has a plunger, which is the equivalent of Carr's piston, and which was a well-known substitute for a piston in pumps prior to the date of Carr's patent."

Rec. No. 189, pp. 67 to 69.

See also, to same effect, the record of Mr. Carr, the inventor. Carr testifies concerning the defendants' structure in this suit, and describes it in the same words as Mr. Renwick did in the Kirk suit.

Rec., No. 189, pp. 34, 35, 36.

No testimony was introduced on behalf of the defendants to contradict the foregoing testimony, nor was any witnesses called to deny infringement.

On this state of the evidence, and from an examination of the two structures, it is clear that there is no evidence in the case to maintain the plea of non-infringement, and it cannot be discussed by defendant at the hearing.

Bennet vs. Fowler, 8 Wallace, 445.

IV.

It is respectfully submitted that no valid defense was made to the infringement of Carr Reissue No. 978, and that the burden of proving a defense was on the defendants, on the case made by complainants.

Smith vs. Goodyear Dent. V. Co., 93 U. S., 486.

G. G. FRELINGHUYSEN,
Complainant's Counsel.

EDMUND WETMORE,
Of Counsel with Complainant.

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Office Supreme Court U. S.
FILED.
JAN 22 1885
JAMES H. McKENNEY.
CLERK.

APPELLANTS' BRIEF.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1884.

No. 190.

EDWARD G. THOMPSON, TRUSTEE FOR CLARA E. CARR, EXECUTRIX, AND GEORGE D. SCOTT, EXECUTOR OF WILLIAM S. CARR, DECEASED, AND SARAH BARTHOLOMEW,

Appellants,

VS.

ELIZABETH E. BOISSELIER AND JOHN C. KUPFERLE.

G. G. FRELINGHUYSEN,
EDMUND WETMORE,
Of Counsel with Appellants.

BARTHOLOMEW PATENT.

SUPREME COURT OF THE UNITED STATES.

EDWARD G. THOMPSON, Trustee for CLARA E. CARR, Executrix, and GEORGE D. SCOTT, Executor of William S. Carr, deceased, and SARAH BARTHOLOMEW,
Appellants,

vs.

ELIZABETH E. BOISSELIER and JOHN C. KUPFERLE,
Defendants, Appellees.

No. 190.

Brief for Appellants.

This appeal is brought from a decree of the United States Circuit Court, for the Eastern District of Missouri, dismissing the bill of complaint.

The bill therein was filed for the infringement of a patent for improvements in water-closets granted to Frederick H. Bartholmew, 12th October, 1858, Numbered 21,734, and afterward extended to his widow, Sarah Bartholomew, for the term of seven years, expiring October 12th, 1879, assigned on the 14th October, 1872, to Keller & Blake as trustees.

After the death of Mr. Keller, Mr. Blake, as sole trustee, instituted this suit by filing a bill of complaint on

the 24th day of January, 1879. After the death of Mr. Blake E. G. Thompson, the present trustee, was duly appointed and the suit was revived and continued by order of Court in the name of the parties hereto.

By stipulation herein the record in case No. 189, same parties; No. 196, McNab & Harlan Co., Appellants, vs. Thompson; No. 197, John Eaton *et al.* Appellants vs. Thompson, in this Court, and so much of the record in the suit of Keller & Blake, Trustees, vs. Kirk, and Same vs. Gibson, as is material, are made part of the record in this suit. The portions of records in the suits against Kirk and against Gibson are printed in Record No. 189.

The defenses set up by the answer in this suit were:

1st. Want of Novelty on account of alleged prior knowledge and use of the patented inventions, and because of certain specified prior patents.

2d. Non-infringement.

No written opinion was delivered by the Court below.

The decree entered in the case was as follows: * * *

" That the said reissued letters patent in the bill of " complaint set forth are not good and valid in law; " that the bill of complaint herein be, and the same is, " dismissed," &c.

Rec., No. 190, p. 9.

Grounds of Appeal.

The decrees appealed from are erroneous because, as appellants submit:

1st. The inventions described in the letters patent in suit are not void for want of novelty.

2d. The defendants were proved to have infringed.

The patent is printed at pages 48, 49, Rec., No. 189.

The invention is for an improvement in water-closets, and as described in the specifications:

"Consists in providing for water-closets a cistern or "drip or leak chamber, arranged upon the top or over "the top of the closet, and placing a supply cock "within or above said drip box or cistern, so that any "waste or leak or drip from the cock shall be conducted "into the trunk, so as to insure the keeping of the floor "dry." * * *

"Upon the cover *P*, I cast a box inclosure or cistern "*E*, about one inch high (more or less) and broad "enough to admit of placing the 'A' cock within the "cistern." * * *

"I screw the cock into the cover of the closet, and "make a hole within the drip box, or in the bottom of "the cock, to admit the leak to fall into the trunk P, "and not on to the floor." * * *

"First, I claim the use of a drip box or leak-chamber, "arranged above the closet and below and around the "supply cock, substantially as described."

Judge BLATCHFORD, in his opinion in the case against McNab & Harlan Mfg. Co., says: "The drip box is "described and shown as arranged upon the top plate "of the closet by being cast upon the top plate, and "as having the supply cock within it, and it is set "forth that any leakage about the cock will drop into "the closet. The leakage from the joints of the supply "cock must fall into the drip box, and thence into the "trunk and the soil pipe, and not fall on the floor."

Defense.

FIRST. Defense of want of novelty.

Several alleged anticipating devices were introduced in evidence by the defendants. None of them show the invention in controversy.

I have seen long pipes attached to the end of pet-cocks so as to conduct away not the leakage from the joints, but the water which passed through the cock when it was opened. I have never seen any apparatus like that sketched by Mr. Holmes, but that apparatus does not contain a real drip box to receive the leakages from the cock and a pipe to carry them off to some point of deposit.

"I have on my former examination stated what I conceive to be the invention of Bartholomew, as described in Patent No. 21,734, and referred to in the first claim thereof; and I understand that one element of the combination therein claimed is a 'trunk' or 'closet,' as it is once called in the patent of the water-closet. This trunk, being lettered P, on Fig. 2. Now, while the sketch of Mr. Holmes does show a drip cup and a discharge pipe, and a cock or valve, yet neither it or any of the devices referred to by him or Mr. Milward show the trunk of a water-closet, or a drip box combined with it so that the water from the drip box runs into the trunk; and nothing in those depositions, therefore, is descriptive of the combination referred to, the first claim of Bartholomew, No. 21,734."

None of these devices contain the elements of the claim of the patent. There are lacking the trunk and the connecting orifice.

No testimony was introduced tending to show that these alleged anticipating devices were the same, or substantially the same, as the patented invention.

The difference between these devices and the patented invention is clearly pointed out by Mr. Renwick.

This defense fails to establish anticipation of the patented invention.

Infringement.

The defendant's water-closet claimed to infringe is marked "Exhibit Kupferle and Boisselier."

No dispute is made that this closet or closets like it in every respect were made and sold by the defendants consent, p. 6, Rec. No. 189.

Mr. Renwick testifies, in the case against Kirk, as found on p. 77, Rec. No. 189, as follows:

"I have examined the defendants' water-closet (Com-
" plainants' Ex. M) in reference to its containing the
" invention described in the first claim of the patent
" named in the question, and believe it contains that
" invention. This claim, as I understand it, is to a
" combination of a drip box, a supply cock, and the
" receiver, container or trunk of the closet; the drip
" box being arranged below and around the supply
" cock so, in the words of the patent, 'that any waste
" or leak or drip from the cock shall be conducted into
" the trunk so as to insure the keeping of the floor dry.'
" As the drip-box is arranged below and around the
" cock it must receive the leaks from the joints thereof;
" and, as it has a passage leading from it in the re-
" ceiver or trunk, the water which falls into the drip
" box must pass through the receiver into the soil pipe,
" and the floor will, therefore, be dry, which is the ob-
" ject sought for by the invention specified in the first
" claim of the patent. The patent describes the drip
" box as arranged above the closet, and it is represented
" in that situation in the drawings; the patent states
" that 'any desirable form or modification of supply-
" cock may be used.'"

"Exhibit M has a reeeiver or trunk, being the iron
" vessel with a spherical bulge on it before referred to;
" also a supply cock, being the brass casting with its
" valve before referred to (a casting containing a valve

"and spherical chamber, being shown in Figure 2, of "the drawings of the patent, the valve being the sup- "ply cock referred to in the claim); and also a drip "box bolted on to the side of the trunk or receiver, "and arranged below and around the supply cock."

"Exhibit M also has a small orifice in the trunk or "receiver located adjacent to the drip-box, and so ar- "ranged with reference to it that any drip or leak re- "ceived into the box shall flow through the orifice into "the receiver or trunk, and thence into the soil pipe. "The supply cock of Exhibit M, the drip box, the "orifice from the drip box leading into the re- "ceiver, the receiver itself, and the arrangement "of the drip box below and around the "supply cock, are all the same as described "in the Bartholomew Patent No. 21,734; but in Ex- "hibit M the drip-box is arranged on one side of the "receiver and near the top thereof, and not upon the "top thereof, as described and shown in the Bartholo- "mew patent; but I consider this change of position "as formal and not substantial, because precisely the "same result is obtained in both cases, and because "this result is attained in both cases by means of the "same operation of the same parts, acting in combina- "tion with each other, and thereupon conclude that "Exhibit M contains the invention referred to in the "first claim of No. 21,734, although the claim does "contain the words 'leak chamber arranged above the "closet.'"

Mr. Carr testifies in this suit of the defendant's device, describes it in the same language as Mr. Renwick did the defendants' device in the Kirk case, and draws the same conclusions, p. 37, Record No. 189.

No dispute was made as to infringement. No witness was called to deny it.

A comparison of the patent and the device of defendant shows infringement, which is testified to by Renwick and Carr, and not denied by any one, show-

ing that the plea of non-infringement cannot be maintained.

Bennett vs. Fowler, 8 Wall, 445.

Patentability.

The patented invention was, as is shown by the Record, new and useful, and as such entitled to the protection of a patent under the 4886 section of the Rev. Statutes.

"Any person who has invented or discovered any "new and useful art, machine, manufacture or compo- "sition of matter, or any new and useful improvement "thereof, not known, may * * * obtain "a patent therefor."

There is a combined action between all the parts claimed in the claim.

The drip box, supply cock and closet all unite in carrying the leakage back to the closet.

The combination here claimed produces a new and improved result never attained before, *i. e.*, the carrying of the leakage from the valve rod joint and coupling into the closet, near the top of the trunk, and is evidence of invention.

Webster Loom Co. vs. Higgins, 105 U. S. 580.

Hailes vs. Van Wormer, 20 Wall., 568.

It is respectfully submitted that the decree of the Circuit Court should be reversed, with costs, and the cause remanded with directions to enter a decree for the appellants for an account.

G. G. Frelinghuysen,
Complainant's Counsel.

Edmund Wetmore,
Of Counsel with Complainant.

114-1

FILED
JAN 22 1885
JAMES H. McKENNEY,
CLERK.

BRIEF FOR APPELLEE.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1884.

THE McNAB & HARLAN MANUFACTURING CO. AND JOHN HARLAN,

Appellants,

vs.

EDWARD C. THOMPSON, TRUSTEE FOR CLARA E. CARR, EXECUTRIX, AND GEORGE D. SCOTT, EXECUTOR OF WILLIAM S. CARR, DECEASED, AND SARAH BARTHOLOMEW.

No. 196.

JOHN EATON, EDWARD H. COLE, WILLIAM H. COLE AND EDWARD G. BURNHAM,

Appellants,

vs.

SAME.

No. 197.

G. G. FRELINGHUYSEN,
EDMUND WETMORE,
Of Counsel with Appellee.

CARR AND BARTHOLOMEW PATENTS.

Supreme Court of the United States.

THE MCNAB & HARLAN MFG. CO. and JOHN HARLAN, Appellants, AGAINST EDWARD G. THOMPSON, Trustee for Clara E. Carr, Executrix, and GEORGE D. SCOTT, executor of William S. Carr, deceased, and SARAH BARTHOLOMEW.	No. 196.
JOHN EATON ET AL., Appellants. AGAINST SAME.	No. 197.

Brief for Appellees.

These bills of complaint were filed by the same complainant, as in cases No. 189 and No. 190, and like proceedings were had for the substitution of E. G. Thompson as trustee in place of Mr. Blake, and orders to that effect were made herein.

The defendants in these suits are dealers in the goods manufactured and sold by Boisselier & Kupferle, the defendants in suits Nos. 189 and 190.

These suits were each brought on three patents.

The patents put in evidence in each case were the Carr Reissue 978, and Bartholomew Patent No. 21,734, and the proofs of infringement were confined to the third claim of the Carr and the first claim of the Bartholomew patent.

The Carr reissue was in suit in case No. 189, as to the third claim; and the Bartholomew patent in case No. 190, as to its first claim.

These suits were heard together by his Honor Judge BLATCHFORD, and decided in favor of the complainant, on each claim involved.

The opinion of the Court below is printed at p. 14 of Rec. No. 196, and at p. 13 of Rec. No. 197.

The decrees are printed at page 19 of Rec. No. 195, and at p. 18 of Rec. No. 197.

The opinion and decrees are confined to the third claim of Reissue 978, and the first claim of Patent 21,734.

Answers.

The answers deny infringement, allege that the devices claimed were known prior to the patents, and set up anticipating devices to both devices without distinguishing which they anticipate, and then set up other devices as anticipating the Bartholomew patent.

Defense.

The defense made is, by stipulation bringing in the record in Nos. 189, 190, the same as the defenses in Nos. 189 and 190.

The briefs filed in those cases are respectfully referred to, and made part of this brief.

Infringement.

No question was made below as to the selling by the respective defendants of supply cocks and water-closets, like those made, "Exhibits Kupferle & Boisselier," and "Exhibit Kupferle & Boisselier supply cock."

They were purchased from the defendants in Case No. 196, McNab & Harlan Manufacturing Company, by Mr. Abbott, who testified to that effect (pp. 12 and 13, Rec. No. 196).

Admission of the sale by the defendants in Case No. 197, Eaton, Cole & Burnham, of cocks and water-closets of like construction was made by Mr. Cole (p. 12, Rec. No. 197).

The testimony of Mr. Carr and Mr. Renwick in Record No. 189 is respectfully referred to, as pointed out in the briefs for appellants in cases Nos. 189 and 190.

It is respectfully submitted that the decree, below should be affirmed.

G. G. Frelinghuysen,
Counsel for Appellee.

Edmund Wetmore,
Of Counsel with Complainant,
Appellee.

114-1

Office-Supreme Court U.S.
FILED
JAN 21 1885

Supreme Court of the United States,

OCTOBER TERM, 1884.

EDWARD G. THOMPSON *et al.*, *Trustee*, *Appellant*, *vs.* ELIZABETH E. BOISSELIER *et al.* — IN EQUITY. No. 189 and 190.

AND

THE MCNAB & HARLAN MNF'G CO. *et al.*, *Appellant*, *vs.* EDWARD G. THOMPSON *et al.*, *Trustee*, — IN EQUITY. No. 196.

ALSO

JOHN EATON *et al.* *Appellant*, *vs.* SAME. — IN EQUITY. No. 197.

BRIEF OF LLEWELLYN DEANE

FOR APPELLEES IN 189 AND 190, AND FOR APPELLANTS IN 196 AND 197.

Supreme Court of the United States.

THE MCNAB AND HARLAN MANUFACTURING CO. *et al.*, *vs.* EDWARD G. THOMPSON, *Trustee, &c., &c.*	IN EQUITY. No. 196.

AND

JOHN EATON *et al.* *vs.* SAME.	IN EQUITY. No. 197.

We now present specifically the points in which the decision and decree in the above case, in the court below, are considered to be erroneous.

1st. Because the judge who heard and decided the case in the court below, gave an interpretation to the third claim in W. S. Carr's patent, 978, of 1860, which is not warranted by the facts in the record.

2d. Because the judge below held that the third claim in the said Carr patent was correctly and properly stated and was valid as set out.

3d. Because the judge below, in his discussion of the said Carr patent, tacitly included an element in the third claim which was not directly or indirectly, really or inferentially, a part of it, namely, an escape aperture.

4th. Because the judge below, in his decision, ascribed functions to the cup leather mentioned in the third claim in the said Carr patent, which do not in any manner belong to said feature and which it cannot possibly perform.

5th. Because the judge in the court below did not give due and proper consideration to the state of the art as disclosed by the evidence and exhibits introduced in behalf of defendants, which showed that the essential novelty, if there was any, in said Carr patent, consisted in a combination of parts, or peculiar construction in which the escape aperture was a vital element.

6th. Because the valve and the cup leather, and the general operations of both being old, the judge below did not limit said third claim, of the said Carr patent, to the special means of water escape shown and described.

7th. Because the judge below decided that the Kupferle and White patent, 189,562, of 1877, infringed the said third claim of said Carr patent.

8th. Because in the issue made between said patents, the judge below decided that the third claim of the Carr patent was valid and that the defendant had infringed it.

9th. Because the judge below gave a scope and meaning to the first claim in the Bartholomew patent, 21,734, of 1858, which it was not entitled to in view of the state of the art.

10th. Because the judge below did not strictly limit Bartholomew's first claim to the arrangement of the drip box as shown and described, and claimed to be novel in his patent, viz., "above the closet."

11th. Because the judge below did not, in considering said first claim in the Bartholomew patent, give sufficient weight to the proof which showed long before the date of said patent, substantially same drip box, located in some instances

at the base, in others on the side, and in others about on level with the upper plate of the water-closet hopper.

12th. Because the judge below decided that there was nothing in the state of the art to require such construction of Bartholomew's said claim, as would not make the said claim inapplicable to the construction found in the White & Kupferle patent.

13th. Because the judge below decided, in effect, that the words "above the closet" in said Bartholomew's claim applied to White & Kupferle's construction where the drip box was on the side and below the top of the closet.

14th. Because the judge below decided that the location of the drip box shown in the aforesaid patent to White & Kupferle was the equivalent of what was covered by said first claim of Bartholomew's patent.

Supreme Court of the United States,

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FOR APPELLEES IN 189 AND 190, AND FOR APPELLANTS IN 196 AND 197.

The first two above cases were appealed from the United States Circuit Court for the Eastern District of Missouri, wherein decision was rendered in favor of Boisselier and Kupferle by Judge Treat. No opinion appears to have been written in these cases.

The last two cases were appealed from the United States Circuit Court for the Southern Circuit of New York, wherein decision was rendered in an able opinion by Judge Blatchford, against the parties who sold goods as agents of the appellees in above cases 189 and 190.

These are suits for infringement of Re-issued Letters Patent No. 978, granted William S. Carr, June 12, 1860, (original dated August 5, 1856), and No. 21,734, granted F. H. Bartholomew October 12, 1858, the title to both of which appears to be vested in the complainants by assignment.

It is contended that the appellees in 189 and 190, appellants in 196 and 197, have infringed the third claim of Re-issue No. 978 and first claim of No. 21,734.

The appellees and appellants as aforesaid say they have infringed neither of said claims, but if it be held they have done so the said claims are void.

In this discussion we shall consider said patents to Carr and Bartholomew, each by itself.

RE-ISSUE No. 978.

The specification says:

"The nature of my said invention consists in a peculiar construc-
"tion of cock, which is opened by the motion of the seat of the
"water-closet, and allows but little water to run into the pan of the
"closet until the weight is removed from the seat, when the cock,
"gradually closing of itself, allows the water to run for a limited and
"regulated time sufficient to wash out the basin."

The third claim of this patent is as follows:

"I claim, in a valve for water-closets, a cup leather for controlling
"the motion of said valve in closing gradually, substantially as
"specified, said cup leather moving freely in one direction and
"closing against the containing cylinder in the other direction, and
"the leakage of water in said cylinder allowing the movement of the
"cup leather as set forth."

It is deeply regretted that we are not now allowed to introduce the original letters patent and discuss, in that connec-

tion, whether or no this claim, new and interjected into the re-issue, conforms to the aim and scope of said original. But while this strong point is not now open to us, we think a careful analysis of the claim and a consideration of the state of the art will show that said claim is not sound in law, and also, is not warranted in view of what had been done, and was well known when the original patent was taken out.

What was the state of the art at the date of this invention? In the St. Louis case, complainants' counsel frankly admitted that in water-closets cup leathers were old, and that the use of a variable chamber from which the escape of the water was regulated, so as to affect the gradual closing of the valve, was also old.

But for this admission it would have only been necessary to have introduced in evidence the patents cited in our answer to show that such admissions were absolutely essential.

So that all there is now to discuss is, whether the said third claim, as stated, can be so construed as to cover a valid point. Such a construction, we say, cannot legally be put on it.

This claim says: "a *cup leather* for *controlling* the motion of said valve in *closing gradually*." Now, the *cup leather* does not in anywise *control* or *affect* the *gradual* closing of the valve —that is due *entirely* to the "screw 9, &c."—the cup leather, while the closing is taking place, simply acting as a packing to *entirely* prevent *any* closing, precisely as a puppet valve or any other valve when closed would act. The cup leather, so far as this *gradual closing* is concerned, ceases to be a cup leather, and becomes simply a *packing*, and its capacity of allowing the water to pass from *below* has nothing whatever to do with its function in this combination, which is simply to prevent the water from passing from *above*, just as any other packing would do. The fact that it is a *cup leather* in no wise affects the operation of the combination, since the moment the "gradual closing" commences, it becomes a *packing*, just as Hulme's puppet valve or any other pump valve does. From

all which considerations we submit that in this combination cup leathers and puppet or other valves and any packing are exact equivalents, since they each and all serve *only* to prevent any *reflux* of the water.

There is no legitimate combination beween a cup leather *as such* and the device by which the gradual escape of water is effected. The peculiar property of the cup leather, of collapsing when the water presses from below and expanding when the water presses against it from above, having no connection with or influence upon the result or operation of the combination. In other words, the practical working of the combination is in no wise affected by the operation of the cup leather when *admitting* the water to the chamber—but only when the leather commences to act as a packing does its effect on the working of the combination commence, and then it acts negatively and not positively. The cup leather may or may not be a better device for *admitting* the water to the variable chamber; this, however, is of no moment, inasmuch as the invention in no wise relates to the *admission* of the water in the chamber, but is confined solely to the mode of its *expulsion* therefrom; the problem to be solved being—given, a chamber containing water, against which a piston is, by means of a spring, being forced, how shall that water be made to escape gradually from the chamber and allow that piston to rise slowly—the solution of the problem being in no wise aided or affected by considering the means by which the chamber became filled with water, or the nature or action of the device which admits the water.

The Hulme patent has a provision for "keeping a valve open for any required length of time for a supply of water to the basins of water closets," which consists in furnishing the "barrel [or cylinder] A A with openings N N, communicating from the under to the upper side of the bucket [or valve] D, and fitted with a cock O. Now, by turning the cock O in such a position that the water way through the

cock O will be diminished, more time will be required for the bucket to displace the contents of the barrel, and *vice versa.*" A look at the drawing, and particularly at Fig. 2, shows clearly how this is accomplished. There is, it is true, no technical cup leather here, the bucket D having a central valve E to permit the water to pass, just as the central valve in the "Pump Plunger" Exhibit allows the water to pass it. If now the device used by these defendants be compared with the Hulme construction, it will be seen that they are identically the same with the single exception that the defendants use a technical cup leather, in lieu of Hulme's bucket with the central valve. The central valve alone then being old, and the cup leather alone also old in water-closets, the central valve in combination with a cup leather also being old, as shown by Turner's Exhibit "Pump Plunger," and all acting exactly alike, to admit the passage of water in one direction and prevent its escape in the other, and consequently equivalents of each other so far as this feature is concerned, the combination in a water-closet of a plunger with a central valve, and a means of regulating the escape of the water from the upper side of the plunger also being old, we submit that the plaintiffs, if they can hold their claim at all, must have it limited to the special construction shown, to the *particular way* of regulating the escape of the water, to-wit, by the "screw 9 entering through the cup *n*, with a head next the washer 4, and part of one side of the screw filed away so as to adjust the amount of leakage, and regulate the time during which the water will run into the closet," as shown clearly in Fig. 3 of the drawing of Re-issue No. 978. We further find in Kirkwood's closet (p. 98, record), a means of regulating the supply of water to the closet, by arranging for the gradual escape of the water above the plunger.

If, as counsel contended, the use of the cup leather made a cheaper construction, and one less liable to get out of order, that does not affect the question, since it shows merely a judicious selection of devices long known to be interchangeable.

We, however, do not in any wise admit that a puppet valve, as seen in Exhibit "Pump Plunger," is liable to get out of order; in fact, it seems but a glance at it would demonstrate that there is *nothing* to get out of order.

Complainants' counsel, however, contended that this is a claim for a combination simply of a "cup leather" and "a variable chamber"—the particular mode of regulating the escape of water from the chamber—of *making* it a variable chamber—being of no importance. We contend that one of the elements of this claim must, of necessity, be the mechanism for regulating such escape—the device by which such chamber is made *variable*, "as set forth."

No matter which of these constructions of this claim be the correct one, it is clear that the Hulme patent must relieve us of the charge of infringement, or show this claim void.

If our construction be the true one, then "the screw 9, entered through the cup *n*, with the head next the washer 4, and part of one side of the screw filed away, &c.," the device for regulating the escape of the water and making a variable chamber possible, being an essential element of the claim, it is too clear to need argument, that defendants' mode of regulating the escape of the water is not only substantially different, but vastly superior to Carr's.

If, on the other hand, complainants' construction of this claim be the correct one—and the mode of the escape of the water be of no importance—then we submit Hulme's puppet valve and plunger are the exact equivalent of Carr's cup leather, inasmuch as it acts in substantially the same way to effect the flow of water into the chamber and prevent its reflux therefrom—and Carr's construction is a clear infringement on Hulme.

As said by Judge Treat in *Westlake vs. Cartter*, 6 *Fish*, 525:

> "The substantial equivalent of a device is the same as the device "itself—that is, if the patent mentions a specified mode of effecting "a prescribed result, the substitution of any one or more mechani- "cal equivalents for those specially mentioned will none the less

"work an infringement. The object sought by the modes of effect-
"ing the same, substantially as stated in the patented specification,
"is covered by the patent, and whoever adopts the patentee's plan,
"and works out the same result by merely substituting for one or
"more mechanical devices their mechanical equivalent or devices.
"is just as guilty of an infringement as if he servilely copied the
"patented device in all its parts."

We urge, consequently, that the only thing that can save this claim from being held void, in view of the Hulme patent, is to make the "screw 9, &c."—the mode of regulating the flow of water—one of the elements of the combination, since thereby an element is introduced into the combination which finds no equivalent in Hulme, nor in defendants' construction, which, in this particular, is a literal copy of Hulme.

We therefore submit we either do not infringe the third claim of Re-issue No. 978, or that said claim is void as being anticipated by the references cited.

LETTERS PATENT, No. 21,734.

The first claim of this patent is as follows:

"I claim the use of a drip box or leak chamber arranged above the closet, and below and around the supply cock, substantially as described."

The specification says: "The nature of my invention consists in providing for water-closets a cistern, or drip or leak chamber, arranged *upon the top of, or over the trunk* of a closet." As will be seen, the claim is for such a device arranged "*above the closet*," and the drawing also shows such an arrangement and position, thus in terms, certainly, making such *location* an essential element in the claim. Let us see if the state of the art does not render this limitation vital to the validity of the claim.

Milward says (p. 80 of record in 189):

I have carefully examined the certified copy referred to [Bartholomew, No. 21,735], and understand the construction and operation of the drip-cup referred to in the first claim thereof. I have known personally of the use of drip-cups for catching drippings of water, oil, and other fluids, to have been in public use since 1848. I have seen them used and used them in machine shops, in which drippings occur from various causes, some of them being made of sufficient capacity to contain droppings in a long period of time, to be emptied when necessary. This was in cases where, as in the bearings of shaftings, where the drip-pan was hung under the bearings to catch the drippings of oil, and where it was inconvenient to conduct it away in a pipe. The object was to prevent the drippings falling on the floor. And in other cases, such as catching the drippings from the pet cocks of steam cylinders of locomotives and stationary engines, and the gauge cocks of steam boilers. I have seen drip-cups used having the pipes attached for conveying the drippings to any place, to any suitable place away from the cocks, and thus prevent the drippings from falling on the floor. Besides the cases I have referred to as having been seen by me in 1848, I have seen other instances from that to 1856; and in the latter part of 1856 I have seen drip-cups, with conveying pipes for carrying off said drippings, applied to machines which I assisted in building at Philadelphia for operating in sugar mills, and in Brooklyn and New York city, both in the year 1857. I have seen drip-cups employed and publicly used about steam engines and hydraulic machinery for collecting the drippings and conveying them away. The drip-cups, as known among mechanics, for collecting drippings of fluids from cocks, valves and other sources, is one of the earliest contrivances with which I became aware in commencing my mechanical career.

Isaac V. Holmes says (p. 89, record in 189):

My name is Isaac V. Holmes, age 45 years, residence, Cleveland, Ohio, and my occupation mechanical engineer. I have been for the last twenty years actively engaged as a constructing engineer and draughtsman in the designing of various kinds of machinery; for eight years was superintendent of construction at the Novelty Iron Works, New York, and for the past five years have occupied the position of engineer and superintendent of a manufacturing establishment located at Mt. Vernon, Ohio. I am now a member of a commission appointed by Congress to make tests relative to the cause of boiler explosions. I have applied drip-cups as early as the year 1852, for the purpose of catching the drippings of water that would leak down the gauge cocks placed on the front of marine boilers, and so arranged in relation to said cocks that the waste water would be caught in those drip-cups, and carried from them,

by suitable connections, into the bilge of the vessels. I have applied, in same year and since, suitable drip-cups to the valve stems of engines, for the purpose of catching the waste water that would leak through the stuffing-box packing, and convey the same, by suitable connections, clear of the working parts of the machine. I have also applied them for collecting the drip of waste water from the check and stop valves attached to the pump chambers of hydraulic presses. These applications of drip-cups were made by me to engines and boilers constructed at the Novelty Iron Works, New York city, and the application of the same to hydraulic pumps, to such machines built at the same works and erected in cotton presses in the city of New York about 1855. They were public uses, and were not considered a new application or device. * * * I have seen them applied to hydraulic pumping apparatus, for the purpose of catching the waste water from valves, as early as the year 1850, in the cities of New York and Brooklyn.

Int. 14. Will you make a sketch showing some of the applications of drip-cups with which you are familiar, as in public use in New York and Brooklyn prior to the year 1854, and append the same to your deposition?

A. I herewith produce such a sketch marked Holmes' Sketch, (record of 189, p. 90), No. 2, wherein Figs. 1 and 2 represent application of drip-cups to pumps which I was familiar with as being applied prior to 1854, wherein portions marked *a* represent drip-cups, and points marked *b* the openings or pipe through which the waste water was delivered—the pipe represented in Fig. 2 being continued to a drain into which the water was discharged.

Int. 15. Describe what drip is caught in the several cups?

A. The drip from the pumb valve proper, and also that of the regulating valve connected therewith, and in Fig. 1 also the leakage from the pump plunger.

Robert Kirkup says (p. 90, record in 189):

My age is 44 years, residence Cincinnati, Ohio, and occupation that of a brass finisher.

Int. 2. What familiarity have you, if any, with the construction of water-closets?

A. I have worked at them, off and on, in Cincinnati, since about 1852 or 1853 up to the present date. It has been part of my trade during that time.

Int. 3. Did you or not ever make pan closets which were fitted with drip-cups to the valves?

A. I have.

Int. 4. How long ago did you make them?

A. I am positive I made them in 1854; probably before that, in Cincinnati.

Int. 5. Did you make them in the regular course of business for sale, or were they privately made?

A. I was working at the time for James Hume, and made the closets for him in the regular course of business, and they were sold by him in his business.

Int. 6. Have you continued to make them since then, 1854?

A. We made them up to the breaking out of the war. I went to the war, and consequently did not work on them after that. Soon after that Mr. Hume died.

Int. 7. Can you produce one of these closets made by you in 1854?

A. I can produce one made off the same pattern, which is an exact fac simile of those made in 1854; and I here produce it, and mark it "Exhibit Kirkup Closet."

Int. 8. How did this drip-pan operate?

A. Any leakage from the valve falls down into the saucer, and runs through the small hole, and finds its way into the inside of the trunk.

Nicoll (p. 91 of 189), and Harrison (p. 92 of 189) also shows that drip-cups in connection with water-closets were old.

Turner (p. 93 of 189), says that twenty-two drip-cups like that shown in his drawing, "Exhibit Turner," were put by him in the Planters' House at St. Louis, as early as 1852.

Int. 5. Please look at the drawing attached to the specification of James Hume's patent, * * * and state the construction of the valve of the piston shown there.

A. The piston J in this Fig. 4 is an ordinary cup leather, representing the cup leather and piston shown in Carr's patent, re-issue 978.

Int. 6. How long have you known the use of a cup leather of that sort?

A. Thirty-five years.

Int. 7. For what purpose are they used?

A. For pump plungers and water-closet valves; that is the principal use for which they were adopted.

Madden (p. 11 of 190) says the drawing, "Exhibit Madden," represents a water-closet drip-cup or pan made in New York city as early as 1854.

We thus see that drip-pans or cups, of various kinds and shapes, were used in connection with different kinds of machinery and water-closets long anterior to the alleged invention of Bartholomew—in fact, that their use was universal wherever occasion demanded. Madden and Turner show such drip-pans arranged *below* the base of the trunk of the closet. Kirkup, and Harrison, and Nicoll also testify to drip-cups being used with water-closets.

It further appears, that as early as 1848 Kirkwood patented a water-closet having the valve located near the top of the trunk of the closet, as clearly shown in the drawing facing page 15 of the Exhibits in *Keller vs. Gibson*, the location of this valve being nearer the top of the closet than defendants', in fact, part of the valve being actually *above* the top of the closet.

Nicoll and Harrison show also that as early as 1849 valves were put on the *top* of water-closets, and furthermore, that the drip from the valves was led into the trunk of the closet, the sketch facing page 97 of 189, also Kirkwood closet, (page 98 of 189,) showing clearly the construction.

In this condition of the art, Bartholomew makes his application for a patent, and in his specification and claim expressly limits his pan or cup to a specified location—"upon the *top* of or *over* the trunk of the closet," "arranged *above* the closet," language perfectly plain, simple, and requiring no skill to comprehend. But since, as seen in our exhibit, we do not use a drip cup situated either "on top of the trunk" or "above the closet," but one attached to the side of the trunk *below* the top, the contention now is that this claim should be read and construed as if the words, "above the closet," were

eliminated therefrom, and since the claim, in using the words "substantially as described," refers us back to the specification for further explanation, we must strike from the specification the clause, "arranged *upon the top or over* the trunk of a closet," since only by making such an elimination can it be for a moment contended that our construction is brought within the claim.

Valves placed on the floor at the *foot* of the trunk being old, as seen in Hulme's patent (p. 101 of 189), and in Madden and Turner's sketches; valves attached to the trunk of closets and *below* the top being old, as seen in Kirkwood; valves *above* the top of the trunk also being old, as seen in Exhibit referred to by Nicoll and Harrison; drip-pans in connection with the valves, like Hulme's, Madden's and Turner's, leading the drip into the soil pipe at the foot of the trunk being old, as shown by Madden and Turner; a provision by means of a hollow arm for leading the drip of the valve into the trunk of the closet, when the valve is on top of the trunk, being old, as shown by Nicoll and Harrison; can this claim—which certainly *in terms* is limited to a particular location of the drip "above," "on the top of" the closet—be construed to cover a drip-cup 'below' and 'under' the cover of the closet? Is not the only thing which can give it any validity this very limitation to a particular position, the result of which is that the drip-cup can be constructed more cheaply and simply than when the valve is in either of the other positions shown in the anterior devices? Can this claim be enlarged, all its limiting clauses as to position be eliminated so as to enable the patentee to cover and include the use of the ancient drip-cup with these differently located valves, which, in fact, by reason of their superior location have actually driven the Bartholomew valve out of use, for no one at this day, for a moment, thinks of arranging valves on the top of the closet, although at the time of the issuance of the patent that exact location was considered so desirable that the patentee made it an essential element of his claim.

In regard to the decisions in the Eastern District of Pennsylvania by Judge McKennan, declaring these patents valid, we have to say that the Madden and Turner drip-cups were *not* before that court, nor was the "Pump Plunger," nor is there any proof here that the devices used by us are the same as those involved in that case. In making this latter statement I do not overlook the testimony of the complainant Carr it his answer to Int. 12, where he says the Kirk and Wolff closets were constructed "almost identically the same as the Kupferle & Boisselier closet sold by the defendants in this suit. Their arrangement and operation was precisely the same; when I say 'almost indentically,' I mean that there may have been slight differences in dimensions of the several parts, but the *principle and operation* was the same so far as the drip-box and supply cock are concerned." The "principle and operation" of the Turner and Madden drip-cup are the same as that of Bartholomew. So, too, the "principle and operation" of the devices used in the Hulme patent (p. 96, record 189), and in the Kirkwood patent (*Idem*, p. 98), are the same as the Carr device, since all, recognizing the "principle" that the plunger or valve cannot rise unless the water above it is removed, and the necessity that the plunger should not rise instantaneously, lest a sufficient "wash" should not be given to the bowl of the closet, adopt a device for retarding the escape of the water above the plunger or valve; the "operation" of the several devices being identical in "principle," though that of Carr's is inferior to the others, since, in order to regulate the discharge of such water, it is necessary to take his device apart, while in the other cases it is accomplished by the simple turning of a screw on the outside of the cylinder. We do not know what was the construction found to be an infringement in the Pennsylvania case, but complainants could have shown it beyond a doubt by introducing one of the closets in evidence. Carr says they were the same in "principle and operation" as ours. Were they substantially the same in construction is the vital question, and

on that we are left almost totally in the dark. In order that that decree should have any influence in the present case, it is necessary that proper evidence should have been introduced, that the devices involved in the case were the same as now presented. No sufficient or reliable evidence has been adduced on this point. We therefore hold that Judge McKennan's decision is not binding in the present instance.

We therefore submit that as far as Re-issue No. 978 is concerned, the combination used by us is substantially different from that covered by the third claim of said re-issue, in that our mode of regulating the discharge of the water above the valve is substantially different from Carr's method, and in regard to Bartholomew's patent, No. 21,734, our drip-cup is located in a different position from that claimed by the first claim of said patent, which makes position or location an essential element in the combination, since, unless so limited, the claim is clearly broader than the invention, and consequently invalid.

114-1

Office Supreme Court U. S.
FILED
JAN 21 1885
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States,

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JOHN EATON *et al.* *Appellant*, *vs.* SAME.	IN EQUITY. No. 197.

BRIEF OF LLEWELLYN DEANE

FOR APPELLEES IN 189 AND 190, AND FOR APPELLANTS IN 196 AND 197.

The first two above cases were appealed from the United States Circuit Court for the Eastern District of Missouri, wherein decision was rendered in favor of Boisselier and Kupferle by Judge Treat. No opinion appears to have been written in these cases.

The last two cases were appealed from the United States Circuit Court for the Southern Circuit of New York, wherein decision was rendered in an able opinion by Judge Blatchford, against the parties who sold goods as agents of the appellees in above cases 189 and 190.

These are suits for infringement of Re-issued Letters Patent No. 978, granted William S. Carr, June 12, 1860, (original dated August 5, 1856), and No. 21,734, granted F. H. Bartholomew October 12, 1858, the title to both of which appears to be vested in the complainants by assignment.

It is contended that the appellees in 189 and 190, appellants in 196 and 197, have infringed the third claim of Re-issue No. 978 and first claim of No. 21,734.

The appellees and appellants as aforesaid say they have infringed neither of said claims, but if it be held they have done so the said claims are void.

In this discussion we shall consider said patents to Carr and Bartholomew, each by itself.

RE-ISSUE No. 978.

The specification says:

"The nature of my said invention consists in a peculiar construc-
"tion of cock, which is opened by the motion of the seat of the
"water-closet, and allows but little water to run into the pan of the
"closet until the weight is removed from the seat, when the cock,
"gradually closing of itself, allows the water to run for a limited and
"regulated time sufficient to wash out the basin."

The third claim of this patent is as follows:

"I claim, in a valve for water-closets, a cup leather for controlling
"the motion of said valve in closing gradually, substantially as
"specified, said cup leather moving freely in one direction and
"closing against the containing cylinder in the other direction, and
"the leakage of water in said cylinder allowing the movement of the
"cup leather as set forth."

It is deeply regretted that we are not now allowed to introduce the original letters patent and discuss, in that connec-

tion, whether or no this claim, new and interjected into the re-issue, conforms to the aim and scope of said original. But while this strong point is not now open to us, we think a careful analysis of the claim and a consideration of the state of the art will show that said claim is not sound in law, and also, is not warranted in view of what had been done, and was well known when the original patent was taken out.

What was the state of the art at the date of this invention? In the St. Louis case, complainants' counsel frankly admitted that in water-closets cup leathers were old, and that the use of a variable chamber from which the escape of the water was regulated, so as to affect the gradual closing of the valve, was also old.

But for this admission it would have only been necessary to have introduced in evidence the patents cited in our answer to show that such admissions were absolutely essential.

So that all there is now to discuss is, whether the said third claim, as stated, can be so construed as to cover a valid point. Such a construction, we say, cannot legally be put on it.

This claim says: "a *cup leather* for *controlling* the motion of said valve in *closing gradually*." Now, the *cup leather* does not in anywise *control* or *affect* the *gradual* closing of the valve —that is due *entirely* to the "screw 9, &c."—the cup leather, while the closing is taking place, simply acting as a packing to *entirely* prevent *any* closing, precisely as a puppet valve or any other valve when closed would act. The cup leather, so far as this *gradual closing* is concerned, ceases to be a cup leather, and becomes simply a *packing*, and its capacity of allowing the water to pass from *below* has nothing whatever to do with its function in this combination, which is simply to prevent the water from passing from *above*, just as any other packing would do. The fact that it is a *cup leather* in no wise affects the operation of the combination, since the moment the "gradual closing" commences, it becomes a *packing*, just as Hulme's puppet valve or any other pump valve does. From

all which considerations we submit that in this combination cup leathers and puppet or other valves and any packing are exact equivalents, since they each and all serve *only* to prevent any *reflux* of the water.

There is no legitimate combination beween a cup leather *as such* and the device by which the gradual escape of water is effected. The peculiar property of the cup leather, of collapsing when the water presses from below and expanding when the water presses against it from above, having no connection with or influence upon the result or operation of the combination. In other words, the practical working of the combination is in no wise affected by the operation of the cup leather when *admitting* the water to the chamber—but only when the leather commences to act as a packing does its effect on the working of the combination commence, and then it acts negatively and not positively. The cup leather may or may not be a better device for *admitting* the water to the variable chamber; this, however, is of no moment, inasmuch as the invention in no wise relates to the *admission* of the water in the chamber, but is confined solely to the mode of its *expulsion* therefrom; the problem to be solved being—given, a chamber containing water, against which a piston is, by means of a spring, being forced, how shall that water be made to escape gradually from the chamber and allow that piston to rise slowly—the solution of the problem being in no wise aided or affected by considering the means by which the chamber became filled with water, or the nature or action of the device which admits the water.

The Hulme patent has a provision for "keeping a valve open for any required length of time for a supply of water to the basins of water closets," which consists in furnishing the "barrel [or cylinder] A A with openings N N, communicating from the under to the upper side of the bucket [or valve] D, and fitted with a cock O. Now, by turning the cock O in such a position that the water way through the

cock O will be diminished, more time will be required for the bucket to displace the contents of the barrel, and *vice versa.*" A look at the drawing, and particularly at Fig. 2, shows clearly how this is accomplished. There is, it is true, no technical cup leather here, the bucket D having a central valve E to permit the water to pass, just as the central valve in the "Pump Plunger" Exhibit allows the water to pass it. If now the device used by these defendants be compared with the Hulme construction, it will be seen that they are identically the same with the single exception that the defendants use a technical cup leather, in lieu of Hulme's bucket with the central valve. The central valve alone then being old, and the cup leather alone also old in water-closets, the central valve in combination with a cup leather also being old, as shown by Turner's Exhibit "Pump Plunger," and all acting exactly alike, to admit the passage of water in one direction and prevent its escape in the other, and consequently equivalents of each other so far as this feature is concerned, the combination in a water-closet of a plunger with a central valve, and a means of regulating the escape of the water from the upper side of the plunger also being old, we submit that the plaintiffs, if they can hold their claim at all, must have it limited to the special construction shown, to the *particular way* of regulating the escape of the water, to-wit, by the "screw 9 entering through the cup *n*, with a head next the washer 4, and part of one side of the screw filed away so as to adjust the amount of leakage, and regulate the time during which the water will run into the closet," as shown clearly in Fig. 3 of the drawing of Re-issue No. 978. We further find in Kirkwood's closet (p. 98, record), a means of regulating the supply of water to the closet, by arranging for the gradual escape of the water above the plunger.

If, as counsel contended, the use of the cup leather made a cheaper construction, and one less liable to get out of order, that does not affect the question, since it shows merely a judicious selection of devices long known to be interchangeable.

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We, however, do not in any wise admit that a puppet valve, as seen in Exhibit "Pump Plunger," is liable to get out of order; in fact, it seems but a glance at it would demonstrate that there is *nothing* to get out of order.

Complainants' counsel, however, contended that this is a claim for a combination simply of a "cup leather" and "a variable chamber"—the particular mode of regulating the escape of water from the chamber—of *making* it a variable chamber—being of no importance. We contend that one of the elements of this claim must, of necessity, be the mechanism for regulating such escape—the device by which such chamber is made *variable*, "as set forth."

No matter which of these constructions of this claim be the correct one, it is clear that the Hulme patent must relieve us of the charge of infringement, or show this claim void.

If our construction be the true one, then "the screw 9, entered through the cup *n*, with the head next the washer 4, and part of one side of the screw filed away, &c.," the device for regulating the escape of the water and making a variable chamber possible, being an essential element of the claim, it is too clear to need argument, that defendants' mode of regulating the escape of the water is not only substantially different, but vastly superior to Carr's.

If, on the other hand, complainants' construction of this claim be the correct one—and the mode of the escape of the water be of no importance—then we submit Hulme's puppet valve and plunger are the exact equivalent of Carr's cup leather, inasmuch as it acts in substantially the same way to effect the flow of water into the chamber and prevent its reflux therefrom—and Carr's construction is a clear infringement on Hulme.

As said by Judge Treat in *Westlake vs. Cartter*, 6 *Fish*, 525:

"The substantial equivalent of a device is the same as the device "itself—that is, if the patent mentions a specified mode of effecting "a prescribed result, the substitution of any one or more mechani- "cal equivalents for those specially mentioned will none the less

"work an infringement. The object sought by the modes of effect-
"ing the same, substantially as stated in the patented specification,
"is covered by the patent, and whoever adopts the patentee's plan,
"and works out the same result by merely substituting for one or
"more mechanical devices their mechanical equivalent or devices,
"is just as guilty of an infringement as if he servilely copied the
"patented device in all its parts."

We urge, consequently, that the only thing that can save this claim from being held void, in view of the Hulme patent, is to make the "screw 9, &c."—the mode of regulating the flow of water—one of the elements of the combination, since thereby an element is introduced into the combination which finds no equivalent in Hulme, nor in defendants' construction, which, in this particular, is a literal copy of Hulme.

We therefore submit we either do not infringe the third claim of Re-issue No. 978, or that said claim is void as being anticipated by the references cited.

LETTERS PATENT, No. 21,734.

The first claim of this patent is as follows:

"I claim the use of a drip box or leak chamber arranged above the closet, and below and around the supply cock, substantially as described."

The specification says: "The nature of my invention consists in providing for water-closets a cistern, or drip or leak chamber, arranged *upon the top of, or over the trunk* of a closet." As will be seen, the claim is for such a device arranged "*above the closet*," and the drawing also shows such an arrangement and position, thus in terms, certainly, making such *location* an essential element in the claim. Let us see if the state of the art does not render this limitation vital to the validity of the claim.

Milward says (p. 80 of record in 189):

I have carefully examined the certified copy referred to [Bartholomew, No. 21,735], and understand the construction and operation of the drip-cup referred to in the first claim thereof. I have known personally of the use of drip-cups for catching drippings of water, oil, and other fluids, to have been in public use since 1848. I have seen them used and used them in machine shops, in which drippings occur from various causes, some of them being made of sufficient capacity to contain droppings in a long period of time, to be emptied when necessary. This was in cases where, as in the bearings of shaftings, where the drip-pan was hung under the bearings to catch the drippings of oil, and where it was inconvenient to conduct it away in a pipe. The object was to prevent the drippings falling on the floor. And in other cases, such as catching the drippings from the pet cocks of steam cylinders of locomotives and stationary engines, and the gauge cocks of steam boilers. I have seen drip-cups used having the pipes attached for conveying the drippings to any place, to any suitable place away from the cocks, and thus prevent the drippings from falling on the floor. Besides the cases I have referred to as having been seen by me in 1848, I have seen other instances from that to 1856; and in the latter part of 1856 I have seen drip-cups, with conveying pipes for carrying off said drippings, applied to machines which I assisted in building at Philadelphia for operating in sugar mills, and in Brooklyn and New York city, both in the year 1857. I have seen drip-cups employed and publicly used about steam engines and hydraulic machinery for collecting the drippings and conveying them away. The drip-cups, as known among mechanics, for collecting drippings of fluids from cocks, valves and other sources, is one of the earliest contrivances with which I became aware in commencing my mechanical career.

Isaac V. Holmes says (p. 89, record in 189):

My name is Isaac V. Holmes, age 45 years, residence, Cleveland, Ohio, and my occupation mechanical engineer. I have been for the last twenty years actively engaged as a constructing engineer and draughtsman in the designing of various kinds of machinery; for eight years was superintendent of construction at the Novelty Iron Works, New York, and for the past five years have occupied the position of engineer and superintendent of a manufacturing establishment located at Mt. Vernon, Ohio. I am now a member of a commission appointed by Congress to make tests relative to the cause of boiler explosions. I have applied drip-cups as early as the year 1852, for the purpose of catching the drippings of water that would leak down the gauge cocks placed on the front of marine boilers, and so arranged in relation to said cocks that the waste water would be caught in those drip-cups and carried from them,

by suitable connections, into the bilge of the vessels. I have applied, in same year and since, suitable drip-cups to the valve stems of engines, for the purpose of catching the waste water that would leak through the stuffing box packing, and convey the same, by suitable connections, clear of the working parts of the machine. I have also applied them for collecting the drip of waste water from the check and stop valves attached to the pump chambers of hydraulic presses. These applications of drip-cups were made by me to engines and boilers constructed at the Novelty Iron Works, New York city, and the application of the same to hydraulic pumps, to such machines built at the same works and erected in cotton presses in the city of New York about 1855. They were public uses, and were not considered a new application or device. * * * I have seen them applied to hydraulic pumping apparatus, for the purpose of catching the waste water from valves, as early as the year 1850, in the cities of New York and Brooklyn.

Int. 14. Will you make a sketch showing some of the applications of drip-cups with which you are familiar, as in public use in New York and Brooklyn prior to the year 1854, and append the same to your deposition?

A. I herewith produce such a sketch marked Holmes' Sketch, (record of 189, p. 90), No. 2, wherein Figs. 1 and 2 represent application of drip-cups to pumps which I was familiar with as being applied prior to 1854, wherein portions marked *a* represent drip-cups, and points marked *b* the openings or pipe through which the waste water was delivered—the pipe represented in Fig. 2 being continued to a drain into which the water was discharged.

Int. 15. Describe what drip is caught in the several cups?

A. The drip from the pumb valve proper, and also that of the regulating valve connected therewith, and in Fig. 1 also the leakage from the pump plunger.

Robert Kirkup says (p. 90, record in 189):

My age is 44 years, residence Cincinnati, Ohio, and occupation that of a brass finisher.

Int. 2. What familiarity have you, if any, with the construction of water-closets?

A. I have worked at them, off and on, in Cincinnati, since about 1852 or 1853 up to the present date. It has been part of my trade during that time.

Int. 3. Did you or not ever make pan closets which were fitted with drip-cups to the valves?

A. I have.

Int. 4. How long ago did you make them?

A. I am positive I made them in 1854; probably before that, in Cincinnati.

Int. 5. Did you make them in the regular course of business for sale, or were they privately made?

A. I was working at the time for James Hume, and made the closets for him in the regular course of business, and they were sold by him in his business.

Int. 6. Have you continued to make them since then, 1854?

A. We made them up to the breaking out of the war. I went to the war, and consequently did not work on them after that. Soon after that Mr. Hume died.

Int. 7. Can you produce one of these closets made by you in 1854?

A. I can produce one made off the same pattern, which is an exact fac simile of those made in 1854; and I here produce it, and mark it "Exhibit Kirkup Closet."

Int. 8. How did this drip-pan operate?

A. Any leakage from the valve falls down into the saucer, and runs through the small hole, and finds its way into the inside of the trunk.

Nicoll (p. 91 of 189), and Harrison (p. 92 of 189) also shows that drip-cups in connection with water-closets were old.

Turner (p. 93 of 189), says that twenty-two drip-cups like that shown in his drawing, "Exhibit Turner," were put by him in the Planters' House at St. Louis, as early as 1852.

Turner page 94 record 17 189.

Int. 5. Please look at the drawing attached to the specification of James Hume's patent, * * * and state the construction of the valve of the piston shown there.

A. The piston J in this Fig. 4 is an ordinary cup leather, representing the cup leather and piston shown in Carr's patent, re-issue 978.

Int. 6. How long have you known the use of a cup leather of that sort?

A. Thirty-five years.

Int. 7. For what purpose are they used?

A. For pump plungers and water-closet valves; that is the principal use for which they were adopted.

Answer on page 5

Madden (p. 11 of 190) says the drawing, "Exhibit Madden," represents a water-closet drip-cup or pan made in New York city as early as 1854.

We thus see that drip-pans or cups, of various kinds and shapes, were used in connection with different kinds of machinery and water-closets long anterior to the alleged invention of Bartholomew—in fact, that their use was universal wherever occasion demanded. Madden and Turner show such drip-pans arranged *below* the base of the trunk of the closet. Kirkup, and Harrison, and Nicoll also testify to drip-cups being used with water-closets.

It further appears, that as early as 1848 Kirkwood patented a water-closet having the valve located near the top of the trunk of the closet, as clearly shown in the drawing facing page 15 of the Exhibits in *Keller vs. Gibson*, the location of this valve being nearer the top of the closet than defendants', in fact, part of the valve being actually *above* the top of the closet.

Nicoll and Harrison show also that as early as 1849 valves were put on the *top* of water-closets, and furthermore, that the drip from the valves was led into the trunk of the closet, the sketch facing page 91 of 189, also Kirkwood closet, (page 98 of 189,) showing clearly the construction.

In this condition of the art, Bartholomew makes his application for a patent, and in his specification and claim expressly limits his pan or cup to a specified location—"upon the *top* of or *over* the trunk of the closet," "arranged *above* the closet," language perfectly plain, simple, and requiring no skill to comprehend. But since, as seen in our exhibit, we do not use a drip cup situated either "on top of the trunk" or "above the closet," but one attached to the side of the trunk *below* the top, the contention now is that this claim should be read and construed as if the words, "above the closet," were

eliminated therefrom, and since the claim, in using the words "substantially as described," refers us back to the specification for further explanation, we must strike from the specification the clause, "arranged *upon the top or over* the trunk of a closet," since only by making such an elimination can it be for a moment contended that our construction is brought within the claim.

Valves placed on the floor at the *foot* of the trunk being old, as seen in Hulme's patent (p. 101 of 189), and in Madden and Turner's sketches; valves attached to the trunk of closets and *below* the top being old, as seen in Kirkwood; valves *above* the top of the trunk also being old, as seen in Exhibit referred to by Nicoll and Harrison; drip-pans in connection with the valves, like Hulme's, Madden's and Turner's, leading the drip into the soil pipe at the foot of the trunk being old, as shown by Madden and Turner; a provision by means of a hollow arm for leading the drip of the valve into the trunk of the closet, when the valve is on top of the trunk, being old, as shown by Nicoll and Harrison; can this claim—which certainly *in terms* is limited to a particular location of the drip "above," "on the top of" the closet—be construed to cover a drip-cup 'below' and 'under' the cover of the closet? Is not the only thing which can give it any validity this very limitation to a particular position, the result of which is that the drip-cup can be constructed more cheaply and simply than when the valve is in either of the other positions shown in the anterior devices? Can this claim be enlarged, all its limiting clauses as to position be eliminated, so as to enable the patentee to cover and include the use of the ancient drip-cup with these differently located valves, which, in fact, by reason of their superior location, have actually driven the Bartholomew valve out of use, for no one at this day, for a moment, thinks of arranging valves on the top of the closet, although at the time of the issuance of the patent that exact location was considered so desirable that the patentee made it an essential element of his claim.

In regard to the decisions in the Eastern District of Pennsylvania by Judge McKennan, declaring these patents valid, we have to say that the Madden and Turner drip-cups were *not* before that court, nor was the "Pump Plunger," nor is there any proof here that the devices used by us are the same as those involved in that case. In making this latter statement I do not overlook the testimony of the complainant Carr it his answer to Int. 12, where he says the Kirk and Wolff closets were constructed "almost identically the same as the Kupferle & Boisselier closet sold by the defendants in this suit. Their arrangement and operation was precisely the same; when I say 'almost indentically,' I mean that there may have been slight differences in dimensions of the several parts, but the *principle and operation* was the same so far as the drip-box and supply cock are concerned." The "principle and operation" of the Turner and Madden drip-cup are the same as that of Bartholomew. So, too, the "principle and operation" of the devices used in the Hulme patent (p. 96, record 189), and in the Kirkwood patent (*Idem*, p. 98), are the same as the Carr device, since all, recognizing the "principle" that the plunger or valve cannot rise unless the water above it is removed, and the necessity that the plunger should not rise instantaneously, lest a sufficient "wash" should not be given to the bowl of the closet, adopt a device for retarding the escape of the water above the plunger or valve; the "operation" of the several devices being identical in "principle," though that of Carr's is inferior to the others, since, in order to regulate the discharge of such water, it is necessary to take his device apart, while in the other cases it is accomplished by the simple turning of a screw on the outside of the cylinder. We do not know what was the construction found to be an infringement in the Pennsylvania case, but complainants could have shown it beyond a doubt by introducing one of the closets in evidence. Carr says they were the same in "principle and operation" as ours. Were they substantially the same in construction is the vital question, and

on that we are left almost totally in the dark. In order that that decree should have any influence in the present case, it is necessary that proper evidence should have been introduced, that the devices involved in the case were the same as now presented. No sufficient or reliable evidence has been adduced on this point. We therefore hold that Judge McKennan's decision is not binding in the present instance.

We therefore submit that as far as Re-issue No. 978 is concerned, the combination used by us is substantially different from that covered by the third claim of said re-issue, in that our mode of regulating the discharge of the water above the valve is substantially different from Carr's method, and in regard to Bartholomew's patent, No. 21,734, our drip-cup is located in a different position from that claimed by the first claim of said patent, which makes position or location an essential element in the combination, since, unless so limited, the claim is clearly broader than the invention, and consequently invalid.

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